No. 80-2115

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ALEXANDER L. STEVAS
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IN THE
Supreme Court of the United States
OCTOBER TERM 1980

KAREN G. SILKWOOD, by the Administrator of her Estate, Bill M. Silkwood, et al.,
Petitioners,

v.

THE KERR-McGEE CORPORATION, DEAN A. McGEE, JAMES READING, et al.,
Respondents.

PETITION FOR THE ISSUANCE OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

I.

Whether the Tenth Circuit Court of Appeals acted contrary to the Supreme Court's ruling in *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), by holding that members of a class of citizens protected under 42 U.S.C. § 1985(3) who are deprived of their federally-guaranteed constitutional rights to Freedom of Association and Freedom to Travel on the Interstate Highways by an invidiously discriminatory anti-civil-rights conspiracy *because of their activities* undertaken as members of this protected class in furtherance of the interests of this protected class – rather than *because of their mere passive membership* in this class – are entitled to no relief under § 1985(3).

II.

Whether there exists a direct conflict, which must be resolved by the Supreme Court, between the holding of the Tenth Circuit Court of Appeals in this case and the March 26, 1981 holding of the Fifth Circuit Court of Appeals in the case of *Scott* v. *Moore*, 640 F.2d 708, in which the Fifth Circuit declared non-union employees opposing unionization of workers to be a class of citizens protected under § 1985(3) and held that members of this class who were discriminatorily deprived of their federally-guaranteed constitutional rights by an invidiously discriminatory anti-civil-rights conspiracy *because of their activities* undertaken as members of this class to dissuade workers from joining a lawful labor union are entitled to relief under § 1985(3)

III.

Whether, in upholding the District Court's dismissal of the Petitioners' Complaint for failure to state a cause of action cognizable under § 1985(3), the Tenth Circuit Court of Appeals exceeded its authority, invaded the province of the jury, and denied the Petitioners their right to a trial by jury by summarily resolving against the Petitioners the pivotal material fact question as to the identity of the particular class or classes of citizens which were, in fact, "targeted" by the defendants' conspiracy, based on the Circuit Court's independent review of the Petitioners' "complaint as a whole," when the Circuit Court's factual conclusion was directly contrary to explicit allegations in the complaint and substantial evidence presented during discovery.

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No. _____

KAREN G. SILKWOOD, by the Administrator of her Estate, Bill M. Silkwood, et al.,
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v.

THE KERR-McGEE CORPORATION, DEAN A. McGEE, JAMES READING, et al.,
Respondents.

PETITION FOR THE ISSUANCE OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Karen G. Silkwood, represented in this action by the Administrator of her Estate, Bill M. Silkwood, and the three infant heirs of Karen Silkwood petition this Court to issue a Writ of Certiorari to review a ruling of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled cause of action.[1]

[1]Petitioners in the Court of Appeals and Petitioners before this Court are Karen G. Silkwood, by the Administrator of her Estate Bill M. Silkwood, and the three infant heirs of Karen G. Silkwood who are Beverly K. Meadows, Michael E. Meadows and Dawn E. Meadows. Respondents in the Court of Appeals and Respondents before this Court are the *non*-corporate, individual defendants named in the above-entitled cause of action. These individuals are Dean A. McGee, James Reading, Fred Welch, W.C. Gentry, Lawrence Olson, Theodore Rosack, Jacque Srouji, One Unknown Named Agent of the

OPINIONS BELOW

The opinion of the Court of Appeals dismissing the Petitioners' Complaint for failure to state a cause of action under § 1985(3) of Title 42 is published at 637 F.2d 743 (10th Cir. 1980), and is attached hereto as Appendix A at pp. 1a-12a. The Circuit Court's Order refusing the Petitioners' Motion for a Rehearing is attached hereto as Appendix B, at pp. 1b-2b. The Circuit Court's Order Recalling its Mandate and Refusing a Rehearing is attached hereto as Appendix C, at pp. 1c-2c. The opinion of the United States District Court for the Western District of Oklahoma is published at 460 F. Supp. 399 (W.D. Okla. 1978) and is attached hereto as Appendix D, at pp. 1d to 29d.

Other appendices also attached include the Petitioners' Complaint which is attached hereto as Appendix E, at pp. 1e to 32e. The Petitioners' 1978 Response to the Defendants' Motion for Summary Judgment and some exhibits submitted therewith to the District Court below is attached hereto as Appendix F, at pp. 1f to 134f. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit entered in *Scott* v. *Moore,* 640 F.2d 708 (1981) is attached hereto as Appendix G, at pp. 1g to 50g.

JURISDICTION

The opinion of the Circuit Court of Appeals was entered on December 3, 1980. Timely application for a

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Federal Bureau of Investigation, James J. Kelly, Peter Colefax, Earl M. Jorgensen, Edwin L. Kennedy, Breene M. Kerr, Robert S. Kerr, Jr., F.C. Love, George B. Parks, J.B. Saunders, A.P.F. Seale, James E. Webb, R.T. Zitting, Parker S. Dunn, Wayne Norwood, Ronald Adkisson, Roy E. King, G.T. Sinke, J. Marler and G. France.

rehearing was originally denied by the Circuit Court on January 16, 1981 without notice to the Petitioners. Upon notification of this failure of notice, the Circuit Court withdrew its Order of January 16, 1981 and re-entered its Order declining a rehearing on April 6, 1981. Upon timely motion made to the Supreme Court, JUSTICE WHITE granted the Petitioners until June 15, 1981 to file with this Court their Petition for the Issuance of a Writ of Certiorari to review the Circuit Court's December 3, 1980 opinion.

The jurisdiction of the Supreme Court is invoked under Title 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1985(3) of Title 42 of the United States Code provides, in pertinent part, as follows:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . .in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

This petition constitutes the final demand by the heirs of the Estate of Karen G. Silkwood for a trial on the merits of the complaint they filed in November 1976, under Title 42 U.S.C. § 1985(3), charging 27 individuals with participation in a class-based, invidiously discriminatory, anti-civil-rights conspiracy which discriminatorily deprived (a) Karen Silkwood and the other persons employed at the Kerr-McGee Nuclear Facility in Oklahoma who were endeavoring to organize a lawful labor union,[2] and (b)

[2] *Administrative relief* which was potentially available to Karen Silkwood and her fellow union organizers pursuant to the National Labor Relations Act *was exhausted* when two separate field investigators of the National Labor Relations Board dispatched from the Region III Field Office to investigate charges of an anti-union conspiracy underway at the Kerr-McGee Nuclear Facility each independently *concluded that such an anti-union conspiracy was underway against union members* at that facility, but that this conspiracy was of such a serious nature that it was criminal. This conclusion required the transfer of this case from the NLRB to the FBI. This transfer brought the NLRB action in this case to a conclusion, with no relief afforded. *See* Petitioners' Deposition of Edwin Youngblood, Director of the Region III Field Office of the National Labor Relations Board, taken on June 29, 1978. *See also* Appendix F at pp. 55f to 134f.

In addition, in its opinion below, the Circuit Court expressly found that the limited relief potentially available to Karen Silkwood and her fellow union organizers pursuant to the National Labor Relations Act was totally insufficient to redress the invidious, discriminatory, anti-civil-rights conspiracy described in the Petitioners' Complaint and that § 1985(3) authorized the District Court to grant relief over and above that potentially available pursuant to the National Labor Relations Act to union organizers who had been discriminatorily deprived of their federally-guaranteed constitutional rights by an invidious, discriminatory, anti-civil-rights conspiracy such as that described in Petitioners' Complaint. App. A, pp. 1a-9a.

The existence of such concurrent jurisdiction under the Federal Civil Rights Act to vindicate violations of constitutional rights protected in only a limited manner by less comprehensive federal statutes has been expressly recognized by this Court. *E.g., Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459-61 (1975).

Karen Silkwood and the other persons employed at the Kerr-McGee Nuclear Facility in Oklahoma who had filed complaints against the Kerr-McGee Nuclear Corporation under the Federal Atomic Energy Act,[3] of their federally-guaranteed constitutional rights to Freedom of Association and Freedom to Travel on the Interstate Highways.

This class-based, invidiously discriminatory conspiratorial deprivation of constitutional rights was effectuated by independently illegal activities such as telephone wiretapping, electronic surveillance, physical threats, and physical harassment on the interstate highways, which course of illegal conduct finally resulted in the nationally-publicized hit-and-run automobile death of Karen Silkwood in a night-time automobile crash on November 13, 1974. See Petitioners' Complaint, Appendix E, pp. 17e-20e and 23e-24e. This hit-and-run killing occurred only moments before Karen Silkwood was to meet with *New York Times* reporter David Burnham to deliver to him documented proof of falsified safety tests and missing plutonium at the scandal-ridden Kerr-McGee Nuclear Facility just outside of Oklahoma City, Oklahoma. *See generally* R. RASHKE, THE KILLING OF KAREN SILKWOOD (Houghton Mifflin, Boston, 1981). The Petitioners' evidence submitted below amply demonstrated that these illegal overt acts were undertaken against Karen Silkwood

[3]These charges were set forth in Counts I and II of the Petitioners' three-count civil complaint. App. E, at pp. 15e and 21e. Count III of the complaint charged the Kerr-McGee Nuclear *Corporation* with gross, willful and wanton conduct which resulted in the placing of 400,000 disintegrations per minute of radioactive plutonium on the food in the private home refrigerator of Karen Silkwood which inflicted grievious radiation injury to Karen Silkwood. An Oklahoma Federal District Court jury awarded the Estate of Karen G. Silkwood a judgment of $10.5 million for this conduct on May 18, 1979. That case is not a part of this appeal. See *Silkwood* v. *Kerr-McGee Corp.*, 485 F. Supp. 566 (W.D. Okla. 1979), *appeal pending* No. 79-1879.

and other class members and that these overt acts were participated in by agents of the defendants and by agents of the State of Oklahoma who were members of the Oklahoma City Police Department. Agents of the FBI participated in the cover-up of these overt acts.

The United States District Court for the Western District of Oklahoma dismissed the Petitioners' § 1985 complaint in 1978, declaring that the complaint, on its face, failed to state a cause of action upon which legal relief could be granted under § 1985.

In dismissing the complaint, the District Court expressly quoted the rationale of the District Court opinion written in *Arnold* v. *Tiffany*, 359 F. Supp. 1034, 1036 (C.D. Cal. 1973), asserting that:

> the words "class-based, invidiously discriminatory animus" refer, at most, to that kind of irrational and odious class discrimination akin to racial bias – such as discrimination based on national origin or religion. 460 F. Supp. at 406; App. D, p. 13d.

The District Court never questioned the ability of Petitioners' evidence to prove their charges, nor did the District Court express any doubt whatever that the Petitioners were charging the defendants with a conspiracy against the entire membership of the two classes of citizens of which Karen Silkwood was a member.

The District Court did state *by way of dicta* that it found itself generally:

> in agreement with the numerous courts who have rejected claims of class-based animus allegedly directed toward groups which did not tend to exist prior to the occurrence of the events set forth

> in the complaint and which tend to be defined by one particular activity or by plaintiff's invididual situation. *Id.*, at 407; App. D, p. 16d.

However, the District Court based its actual *holding* in this case upon its conviction that the two particular classes of citizens pleaded as the "targets" of the conspiracy simply are not classes of citizens protected under § 1985(3). It did so by stating as follows:

> While animus directed against groups such as Jehovah's Witnesses, persons of Japanese origin, or Democrats, may provide the necessary motivation element, animus directed against *employees at the Cimarron facility who were organizing a union or who had filed complaints against their employer under the Atomic Energy Act,* does not. *Id.* (emphasis added)

In its opinion, the District Court did recognize that there were other Circuit Court rulings that would mandate recognition of the two classes of citizens pleaded as classes protected under § 1985(3). *Id.*, at 405; App. D, p. 12d. However, the District Court expressly chose to join the District Court in *Arnold* v. *Tiffany* and the two *minority* Circuit Courts which have restricted § 1985's statutory protection to blacks and to other classes of citizens whose members are all involuntarily defined by one immutable physical characteristic, such as race.[4]

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[4] *Murphy* v. *Mount Carmel High School*, 543 F.2d 1189 (7th Cir. 1976) and *Bellamy* v. *Mason's Stores, Inc.*, 508 F.2d 504 (4th Cir. 1974).

Contra, Richardson v. *Miller*, 446 F.2d 1247 (3rd Cir. 1971); *Westberry* v. *Gilman Paper Co.*, 507 F.2d 206 (5th Cir. 1975) and *Scott* v. *Moore*, 640 F.2d 708 (5th Cir. 1981); *Cameron* v. *Brock*, 473 F.2d 608 (6th Cir. 1973); *Action* v. *Gannon*, 450 F.2d 1227 (8th Cir. 1971); *Hardyman* v. *Collins*, 183 F.2d 308 (9th Cir. 1950). For District Court opinions to this same effect, *see, e.g., Lowenstein* v.

On appeal, the Tenth Circuit Court of Appeals rejected the District Court's line of legal reasoning and set forth an entirely different ground for affirming the dismissal of the Petitioners' complaint for failure to state a cause of action. *Silkwood* v. *Kerr-McGee,* 637 F.2d 743 (10th Cir. 1980). App. A.

At pages 746 and 747 of its opinion, (pp. 5a to 9a of App. A), the Tenth Circuit Court of Appeals expressly ruled that § 1985(3) protected each of the two classes described by the Petitioners on the face of their Complaint as the "targets" of the class-based conspiracy complained of in this case. Then, after making the "balanced inquiry" required by this Court in *Farmer* v. *United Brotherhood of Carpenters,* 430 U.S. 290, 300 (1977), into the factors which determine whether or not other statutes, such as the National Labor Relations Act, in granting protection to these two classes, excluded § 1985(3) protection, the Circuit Court expressly ruled that it was "the intent of Congress" that these classes be protected under § 1985(3) when the National Labor Relations Act and other statutes failed to extend to their members adequate protection against criminal anti-civil-rights conspiracies such as that described in this complaint. 637 F.2d at 747; App. A, pp. 8a-9a.

The Circuit Court then went on to set forth a half dozen separate reasons why members of these two classes of citizens *were* protected under § 1985(3) against the con-

Rooney, 401 F. Supp. 952 (E.D. N.Y. 1975); *Franceschina* v. *Morgan,* 346 F. Supp. 833 (S.D. Ind. 1972); *Reichart* v. *Payne,* 396 F. Supp. 1010 (N.D Cal., 1975); *Bradley* v. *Clegg,* 403 F.Supp. 830 (E.D. Wis. 1975), and *Local #1* v. *Teamsters,* 419 F. Supp. 263 (E.D. Pa. 1976).

See generally, U.S. v. *Guest,* 383 U.S. 745, 761 *et seq.*, 774 *et seq.* (1966) (concurring opinions of Clark, Black and Fortas and of BRENNAN, Warren and Douglas), *Oregon* v. *Mitchell,* 400 U.S. 112, 229 *et seq.* (1970) (concurring opinion of BRENNAN, WHITE and MARSHALL), and *Katzenbach* v.*Morgan,* 384 U.S. 641 (1966).

spiracy described in this particular complaint – so long as the Petitioners could show that the actions taken by the defendants "stem from plaintiffs' *membership* in the class," "that these workers were discriminated against by their employer *for being members of* an organization engaging in concerted activities for the purpose of collective bargaining or other mutual aid or protection" or that "the defendants. . . took discriminatory action against employees *because of their status as members of* the groups described above." *Id.*, at 746-747; App. A, 5a to 9a (emphasis added).

However, the Circuit Court went on to enter another legal ruling in this case. In this legal ruling, the Circuit Court declared that § 1985(3) affords relief to members of classes which are constitutionally protected under § 1985(3) *only* in those instances in which members can show that the individiously discriminatory anti-civil-rights conspiracy attacked and discriminatory deprived them of their federally-guaranteed constitutional rights *because of their mere status* as members of such a constitutionally protected class. No relief is available under § 1985(3), the Circuit Court declared, to members of such a constitutionally protected class of citizens if they are attacked and discriminatory deprived of their federally-guaranteed constitutional rights by such a conspiracy *because of their activities undertaken as members of such a protected class.* The Circuit Court declared such attacks to be "private" or individual to the particular members attacked for their activities undertaken as a member of the class. *Id.*, at 748; App. A, p. 11a.

The Circuit Court then affirmed the District Court's dismissal of the Petitioners' § 1985(3) complaint for failure to state a cause of action on the entirely new ground that it was the Circuit Court's opinion that the

Petitioners' complaint, taken "as a whole," demonstrated that, in fact, the defendants in this case discriminatorily deprived Karen Silkwood and her associates of their federally-guaranteed constitutional rights by a conspiracy *not because of their mere status as members* of either of the two admittedly protected classes of citizens, but, instead *because of the activities they undertook as members of these two protected classes. Id.*

REASONS FOR GRANTING THE PETITION

The ruling of the Tenth Circuit Court of Appeals in the case below requires the review of this Court, because that ruling directly contravenes an express decision of this Supreme Court, directly conflicts with the decision of another Circuit, and represents such a radical departure from accepted judicial procedure as to call for the exercise of the Supreme Court's supervisory power.

If allowed to stand, the decision below will seriously jeopardize not only labor union organizers and federal whistle-blowers, but activists and organizers for all other classes of citizens intended by the federal courts to be protected under 42 U.S.C. § 1985(3), by denying them any statutory protection against invidiously discriminatory anti-civil-rights conspiracies, if they are discriminatorily deprived of their federally-guaranteed constitutional rights *because of their activities* undertaken as class members in furtherance of the interests of their constitutionally protected class. Review by this Court is therefore imperative.

I.

The Supreme Court should grant certiorari to review the decision of the Tenth Circuit because that decision directly

contravenes this Supreme Court's decision in *Griffin* v. *Breckenridge,* 403 U.S. 88 (1971), which recognized that § 1985(3) protects *all members* of protected classes who are attacked by invidiously discriminatory anti-civil-rights conspiracies – including those members of such classes who are attacked *because of their activities* undertaken as class members in furtherance of the interests of their protected class. Rule 17(c) of this Court's Rules specifically authorizes the issuance of a Writ of Certiorari to review such Court of Appeals rulings.

Once a Circuit Court of Appeals has declared a given class of citizens to be constitutionally entitled to protection under § 1985(3) against private, invidiously discriminatory, anti-civil-rights conspiracies, that Circuit Court is not free to refuse protection to members of the very same protected class who are attacked and discriminatorily deprived of their federally-guaranteed constitutional rights by such a conspiracy *because of their "activities" undertaken as members of that protected class* rather than because of their mere membership in the class.

The constitutionally discriminatory attacks which were directed against a *"worker* for Civil Rights for Negroes" and the "out-of-state civil rights *workers"* in *Griffin* v. *Breckenridge,* 403 U.S. at 90, 103, 106 (emphasis added), were *not* undertaken against those particular petitioners because of their mere passive status as members of the black race. The petitioners in *Griffin* v. *Breckenridge* were attacked and discriminatorily deprived of their federally-guaranteed constitutional rights to Freedom of Association and Freedom to Travel on the Interstate Highways *because of their activities* undertaken as members of a class of American citizens which the Court found to be constitutionally entitled to protection against even purely

private invidiously discriminatory anti-civil-rights conspiracies under § 1985(3). *Id.*

Griffin v. *Breckenridge* clearly established that invidiously discriminatory anti-civil-rights attacks directed against *"workers"* or "activist" members of a class of citizens expressly declared by a Circuit Court to be entitled to protection under § 1985(3), are prohibited by § 1985(3) – regardless of whether such persons are attacked because of their mere passive status as members of this constitutionally protected class or because of their activities undertaken as members of such an explicitly protected class.

Thus, once "union organizers" or "persons engaged in organizing a lawful labor union" are explicitly declared by a Circuit Court of Appeals to be entitled to protection under § 1985(3) against invidiously discriminatory anti-civil-rights conspiratorial attacks, that court is not free to deny relief to members of that class who are attacked and discriminatorily deprived of their federally-guaranteed constitutional rights to Freedom of Association and Freedom to Travel on the Interstate Highways by such a conspiracy *because of their activities undertaken as members of that constitutionally protected class.*

The respondents counter with their repeated contention that the only persons who are entitled to relief under 1985(3) are those persons who can show that they were discriminatorily deprived of their constitutional rights by a conspiracy directed against them exclusively *because of their mere status as a member* of a class whose members are all involuntarily defined by a single immutable "intrinsic characteristic" – such as their race or some other physical characteristic.

In short, the Respondents contend that anti-civil-rights conspirators are free, as far as § 1985(3) is concerned, to discriminatorily deprive of their constitutional rights "union organizers," "anti-nuclear organizers," "workers for Negro civil rights," "out-of-state civil rights workers," or any other persons who are members of a class of citizens expressly declared to be constitutionally protected under § 1985(3) – so long as the conspirators can effectively assert that their illegal, discriminatory conduct was undertaken against them because of the victims' activity undertaken as members of the protected class and not simply because of the victims' mere membership in that protected class.

The Petitioners ask the Supreme Court to enforce, in the Tenth Circuit, its ruling in *Griffin* v. *Breckenridge,* declaring that members of classes of citizens held to be protected under § 1985(3) are protected against private, invidiously discriminatory, anti-civil-rights conspiracies under this Act whether they are attacked and discriminatorily deprived of their constitutional rights because of their mere status as a member of a protected class or whether because of their activities undertaken as members of such a protected class.

Both of the classes of citizens described in the Petitioners' Complaint below to have been the "targets" of the conspiracy complained of in this case have been explicitly declared by the Supreme Court to be protected against invidiously discriminatory anti-civil-rights conspiracies when government agents are involved in such discriminations. "Union organizers" were recognized to be such a protected class of persons by this Court in *Hague* v. *C.I.O.,* 307 U.S. 496 (1939). Persons who have reported violations of the federal law to federal authorities were declared to be constitutionally protected in 1895 by the

Certiorari is to resolve a direct conflict between the Circuits on an important point of legal and constitutional interpretation. The Petitioners direct the Court's attention to the March 26, 1981 ruling entered by the Fifth Circuit Court of Appeals in *Scott* v. *Moore,* 640 F.2d 708 attached hereto as Appendix G, at pp. 1g-50g. The Fifth Circuit, in a thorough and extremely well-reasoned opinion, expressly declared that anti-union organizers who were discriminatorily deprived of their constitutional rights by an invidiously discriminatory, anti-civil-rights conspiracy *because of their activities* undertaken to dissuade workers from joining a lawful labor union, *were* entitled to protection under § 1985(3).

Since the Tenth Circuit Court of Appeals decision in the present case was not finally entered until April 6, 1981, some eleven days after the Fifth Circuit's ruling in *Scott* v. *Moore,* the Fifth Circuit did not expressly address the conflict between its decision and the Tenth Circuit Court's refusal to grant relief to the class of citizens discriminated against in the present case. However, these two cases now stand in stark conflict, with anti-union advocates receiving federal court protection but pro-union advocates being denied such protection by the Tenth Circuit.

Thus, there is an irreconcilable "conflict" between the Circuits on the specific question presented by this case: Does § 1985(3) afford protection to citizens who are discriminatorily deprived of their federally-guaranteed constitutional rights by a class-based, invidiously discriminatory, anti-civil-rights conspiracy because of their activities undertaken as a member of a protected class organized to promote or to oppose worker membership in lawful labor unions when such a conspiracy is not adequately redressed by the National Labor Relations Act.

This Court's Rule 17(a) authorizes the issuance of a Writ of Certiorari to resolve such conflicts.

Petitioners also note that the ruling of the Fifth Circuit expressly stated that it was in direct conflict with the Seventh Circuit's interpretation of *Griffin* v. *Breckenridge* set forth in *Murphy* v. *Mount Carmel High School*, 543 F.2d 1189 (1976), an opinion written by Judge (now JUSTICE) STEVENS. The petitioners in *Scott* v. *Moore* have informed the Petitioners in the present case that they will ask this Court to issue a Writ of Certiorari to review the Fifth Circuit's decision in that case.

The Petitioners herein request that the Supreme Court issue a Writ of Certiorari in the present case, so as to have before it both a case involving pro-union organizers and a case involving anti-union organizers. A review of these two cases together will greatly facilitate this Court's resolution of the conflict between the Circuits on this important question of law.

III

The third reason why the Supreme Court should grant the Petition for the Issuance of a Writ of Certiorari is that it is urgently necessary for the Court to exercise its power of supervision over the Tenth Circuit Court of Appeals. This Court of Appeals has grossly invaded the province of the jury by basing its affirmation of the District Court's dismissal of the Petitioners' complaint upon its unilateral resolution of a pivotal material fact question concerning the identity of the class targeted by the conspiracy charged in this case — in a manner which directly conflicts with specific allegations in the complaint which were supported by substantial evidence presented to the District Court during the discovery phase of this case.

In affirming the dismissal of the Petitioners' complaint, the Tenth Circuit said:

> To state a cause of action under § 1985(3) the law requires prejudice against a class *qua* class. Here it seems clear from the complaint as a whole that. . .the hatred which defendants allegedly harbor is against Karen Silkwood and her associates arising out of the activities of parties involved. 637 F.2d at 748; App. A, p. 11a.

Whether this entirely new "finding" by the Circuit Court is predicated upon Rule 12(b)(6) or Rule 56 of the Federal Rules of Civil Procedure, it is totally improper and should be set aside by this Court.

If the Circuit Court's finding is purported to be based on Rule 12(b)(6), its finding clearly disregards the rule that requires the complaint to be construed in the light most favorable to the Plaintiff, and that any doubts be resolved in favor of the Plaintiff. *E.g., Scheuer* v. *Rhodes,* 416 U.S. 232 (1974). If a question of material fact is presented by the complaint, that question of fact must be resolved by the jury, *not* by the court's judgment on the pleadings. *E.g., Mitchell* v. *Archibald & Kendall, Inc.,* 573 F.2d 429, 432 (7th Cir. 1978). This is even more true when the court in question is the Circuit Court of Appeals, which has not even seen the evidence available to the District Court.

On the face of their Complaint, the Petitioners charge the Defendants with discriminatorily depriving Karen Silkwood and her associates of their federally-guaranteed constitutional rights pursuant to a conspiracy directed *not* just against Karen Silkwood, but against *all* persons employed at the Kerr-McGee Nuclear Facility who were endeavoring to organize a lawful labor union, and against *all* persons employed there who had filed complaints

against the Kerr-McGee Corporation under the Atomic Energy Act. Petitioners' Complaint, App. E, pp. 15e-21e.

The Circuit Court is simply not free to ignore this express charge in the complaint, and to assert that "the complaint as a whole" says something altogether different.

Nor are either of these two classes "artfully contrived," or so hemmed in by factual qualifications as to be a "class" of only one individual, as was the case in *Lessman* v. *McCormick,* 591 F.2d 605 (10th Cir. 1979), which the Circuit Court cited, and in *Ward* v. *St. Anthony Hospital,* 476 F.2d 671 (10th Cir. 1973) cited therein. Such cases offer no support at all for a dismissal of this complaint pursuant to Rule 12(b)(6), because this complaint involves classes legitimately protected under § 1985(3) which are made up of significant numbers of people.

Nor would such an order of dismissal be supportable under Rule 56. As this Court has repeatedly stated:

> Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case "show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Fed. Rules Civ. Proc. This rule authorizes summary judgment "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is,. . . [and where] no genuine issue remains for trial. . .[for] the purpose of the rule is not to cut litigants off from their right to trial by jury if they really have issues to try." *Sartor* v. *Arkansas Natural Gas Corp.,* 321 U.S. 620, 627 (1944). *Poller* v. *Col-*

umbia Broadcasting System, Inc., 368 U.S. 464, 467 (1962).

Directly defying such Supreme Court rulings, the Circuit Court in this case had indeed "cut the plaintiff off from her right to a trial" on one of the most crucial questions of fact in the case, indeed, a factual question in support of which the Petitioners presented substantial factual evidence during the discovery phase of this case at the District Court level. For example, the Petitioners showed during discovery:

- that two separate NLRB field investigators independently *concluded that there was in fact an unlawful conspiracy against union members* underway at the Kerr-McGee nuclear facility at the time Karen Silkwood's constitutional rights were discriminatorily violated by the defendants. *See* Petitioners' June 29, 1978 deposition of Edwin Youngblood, Director of the Region III Field Office of the NLRB. *See also,* Appendix F, Exhibit 9, pp. 55f-85f.

- that the defendants unlawfully administered lie-detector tests to workers at the Kerr-McGee facility demanding to know if workers were members of the union or whether they had ever met with union organizers, including but not limited to Karen Silkwood. *Id.*, pp. 50f-55f.

- that the defendants were repeatedly caught by the NLRB inflicting punative transfers and firings to union members (other than Karen Silkwood), which were later declared by the NLRB to be without any colorable grounds. *Id.*, pp. 65f to 67f.

This evidence, along with other evidence available to the Petitioners which was never deemed relevant to present to the Circuit Court – since the District Court order from which appeal was being sought was based on entirely different grounds – most definitely would support a factual conclusion by a jury that the Defendants in this case violated Karen Silkwood's federally-guaranteed constitutional rights pursuant to the class-based invidiously discriminatory anti-civil-rights conspiracy described by the Petitioners on the face of their complaint.

This factual issue should therefore go to a jury. As Justice Black said in his concurring opinion in *Adickes* v. *Kress,* 398 U.S. 144, 176 (1970):

> The existence or nonexistence of a conspiracy is essentially a factual issue that the jury, not the trial judge, should decide. . . .The advantages of trial before a live jury with live witnesses, and all the possibilities of considering the human factors, should not be eliminated by substituting trial by affidavit and the sterile bareness of summary judgment.

For these reasons, this Court should exercise its supervisory authority over the Tenth Circuit Court of Appeals and thereby afford the Petitioners their right to a jury trial on the merits of their well-pleaded § 1985(3) complaint.

CONCLUSION

For these reasons, this Petition for the Issuance of a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: June 15, 1981

APPENDIX A
THE CIRCUIT COURT'S OPINION BELOW

APPENDIX A
THE CIRCUIT COURT'S OPINION BELOW

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

KAREN G. SILKWOOD, by the Administrator of her estate, BILL M. SILKWOOD; and BEVERLY K. MEADOWS; MICHAEL E. MEADOWS; and DAWN E. MEADOWS, the infant heirs of Karen G. Silkwood by their Guardian William E. Meadows, *Plaintiffs-Appellants,*	)	
v.	)	Nos.
THE KERR-McGEE CORPORATION; DEAN A. McGEE; JAMES READING; FRED WELCH; W.C. GENTRY; LAWRENCE OLSON; THEODORE ROSACK; JACQUE SROUJI; ONE NAMED BUT UNIDENTIFIED AGENT OF THE FEDERAL BUREAU OF INVESTIGATION; JAMES J. KELLY; PETER COLEFAX; EARL M. JORGENSEN; EDWIN L. KENNEDY; BREENE M. KERR; ROBERT S. KERR, JR.; F.C. LOVE; GEORGE B. PARKS; J.B. SAUNDERS; A.P.F. SEALE; JAMES E. WEBB; R.T. ZITTING; PARKER S. DUNN; WAYNE NORWOOD; RONALD ADKISSON; ROY E. KING; G.T. SINKE; J. MARLER and G. FRANCE, *Defendants-Appellees.*	)	78-1826 & 79-1014

Appeal from the United States District Court
For the Western District of Oklahoma
(D.C. No. Civ-76-0888)

Daniel P. Sheehan, Oklahoma City, Oklahoma, (Robert Hager, Oklahoma City, Oklahoma, and Eugene R. Scheiman of Kurland and Scheiman, New York, New York, of Counsel, with him on briefs), for Plaintiffs-Appellants.

William G. Paul of Crowe, Dunlevy, Thweatt, Swinford, Johnson & Burdick, Oklahoma City, Oklahoma, and C. Lee Cook, Jr. of Chadwell, Kayser, Ruggles, McGee & Hastings, Chicago, Illinois, for Defendants-Appellees Dean A. McGee, James J. Kelly, Peter Colefax, Earle M. Jorgensen, Edwin L. Kennedy, Breene M. Kerr, Robert S. Kerr, Jr., F.C. Love, George B. Parks, A.T.F. Seale, James E. Webb, R.T. Zitting, Parker S. Dunn, Ronald Adkisson, Roy E. King, G.J. Sinke, James Marler, G. France, III, James Reading, Fred Welch and W.C. Gentry.

Glenn V. Whitaker, Attorney, Civil Division, Department of Justice (Barbara Allen Babcock, Assistant Attorney General, and Larry Patton, United States Attorney, with him on the brief), Washington, D.C., for Defendants-Appellees Lawrence Olson and Theodore Rosack.

Alletta d'A. Belin and Timothy B. Flynn, Center for Law in the Public Interest, Los Angeles, California, filed an amicus curiae brief for the Committee for Public Justice.

Before McWILLIAMS, DOYLE and LOGAN, Circuit Judges.

LOGAN, Circuit Judge.

This is an appeal by the estate and heirs of Karen G. Silkwood from a judgment dismissing for failure to state a cause of action two claims asserted against officials and agents of Kerr-McGee Corporation[1] and agents of the Federal Bureau of Investigation (FBI),[2] based upon the Civil Rights Act of 1871, 42 U.S.C. § 1985(3). They also appeal a summary judgment order against them dismissing their claim against the FBI agents based upon Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). *See* Silkwood v. Kerr-McGee Corp., 460 F. Supp. 399 (W.D. Okla. 1978). The trial court authorized this appeal under Fed. R. Civ. P. 54(b).[3]

The issues treated on appeal are (1) whether the National Labor Relations Board has exclusive jurisdiction over the claims asserted, (2) whether cognizable classes and sufficient class-based animus are shown for purposes of § 1985(3) jurisdiction, and (3) whether a *Bivens* claim may be maintained against FBI agents for actions occurring after Karen Silkwood's death. We find it un-

[1] Kerr-McGee officials and agents named in the complaint are: Dean A McGee; James J. Kelly; Peter Colefax; Earl M. Jorgensen; Edwin L. Kennedy; Breene M. Kerr; Robert S. Kerr, Jr.; F.C. Love; George B. Parks; J.B. Saunders; A.P.F. Seale; James E. Webb; R.T. Zitting; Parker S. Dunn; Wayne Norwood; Ronald Adkisson; Roy E. King; G.T. Sinke; J. Marler; G. France; James Reading; Fred Welch; and Weldon C. Gentry.

[2] Agents of the FBI included as defendants are Lawrence Olson, Theodore Rosack, and "One Named but Unidentified Agent of the Federal Bureau of Investigation." Jacque Srouji is alleged to be an official informant for the FBI and for purposes of this case was treated as an FBI agent.

[3] The court retained jurisdiction over other claims which have now been tried and are the subject of a separate appeal. Silkwood v. Kerr-McGee Corp., 485 F. Supp. 566 (W.D. Okla. 1979), appeal pending No. 79-1879.

necessary to consider other defenses raised by defendants: that the section 1985(3) claims fail for lack of state action and that the actions do not survive the death of Silkwood under Oklahoma law.

The complaint, as its first cause of action, alleges the following. Karen Silkwood was an employee at the Kerr-McGee Corporation's nuclear facility at Cimarron, Oklahoma. The Kerr-McGee defendants formed a conspiracy in November of 1972 to prevent Silkwood and other Kerr-McGee employees organizing a labor union from enjoying the equal protection of the laws. The Kerr-McGee defendants, in the course of this conspiracy, placed Silkwood and others under illegal surveillance, unlawfully entered their homes, automobiles and other private areas, wiretapped their telephones and homes, physically endangered their lives and safety upon the public highways, engaged in discriminatory firing and transfers, and used other forms of coercion to hinder the organization of the union. Silkwood's constitutional rights violated by this course of conduct stem primarily from the First Amendment and include the rights to freedom of speech, travel, association, assembly, press, the rights to petition the government for redress of grievances, to be secure in person, homes, and effects, and not to be deprived of life or liberty without due process of law. Plaintiffs allege that the FBI defendants joined this conspiracy in November of 1974, after the death of Karen Silkwood, to aid the other defendants in their efforts to cover up the prior conspiratorial activities. All defendants purportedly covered up information and gave false reports to various federal investigative officials for the purpose of depriving Karen Silkwood and others of the equal protection and enjoyment of the laws of the United States.

The second claim is essentially identical to the first, ex-

cept that the class is defined as Karen Silkwood and the other Kerr-McGee employees who filed complaints against the Kerr-McGee Corporation under the Atomic Energy Act.

Jurisdiction

Although the district court did not treat the issue, defendants have asserted that the National Labor Relations Board (NLRB) has exclusive jurisdiction of both claims under the preemption doctrine of San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959), which states: "When an activity is arguably subject to § 7 or § 8 of the [National Labor Relations] Act [29 U.S.C. §§ 157, 158], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . . ." We believe this important issue of jurisdiction must be resolved before considering any questions going to the merits of the case.

The pertinent allegations regarding this issue are that defendants engaged in two conspiracies against the plaintiff – one designed to deprive Karen Silkwood and other employees "who were engaged in organizing a labor union" of the equal protection and enjoyment of the laws of the United States; the other designed to hinder and/or punish Silkwood and others "who had filed complaints against the corporation under the Atomic Energy Act from seeking and enjoying the equal protection of the laws" to associate with one another and to speak to the news media. An alleged objective and activity of both conspiracies was "harassment of the freedom of movement and travel, so as physically to endanger their [Silkwood's and others'] safety and lives upon the public highways."

The Supreme Court has indicated that "the decision to preempt federal and state court jurisdiction over a given class of cases must depend on the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies." Vaca v. Sipes, 386 U.S. 171, 180 (1967). Three critical factors generally control the disposition of the preemption question. First, whether there exists a potential for a direct conflict of substantive law between the National Labor Relations Act (NLRA) and the state or federal cause of action; second, whether there is a state interest "deeply rooted in local feeling and responsibility"; and third, whether adjudication of the cause of action interferes with the effective administration of national labor policy by deciding issues identical to those underlying the labor dispute. Farmer v. United Brotherhood of Carpenters, 430 U.S. 290, 298 (1977). On the basis of these criteria, state court jurisdiction has been held proper for actions for libel, Linn v. United Plant Guard Workers, 383 U.S. 53 (1966); malicious interference with a lawful occupation, International Union, United Automobile, Aircraft and Agricultural Workers v. Russell, 356 U.S. 634 (1958); and intentional infliction of emotional distress, Farmer v. United Brotherhood of Carpenters, *supra.*

In the instant case, there is little difficulty in meeting the first two criteria. The deprivation of civil rights through a conspiracy and course of conduct involving wiretapping, surveillance, discriminatory firing and transfers, breaking and entering, and life-endangering harassment on public highways could rarely, if ever, come within the protection of the NLRA and thus produce a substantive conflict of law. Likewise, it can hardly be denied that the government has a deeply rooted interest in proscribing such conduct.

The third criterion, however, presents a serious obstacle to jurisdiction.

In order to support a section 1985(3) claim, the plaintiff must be a member of a statutorily protected class, and the actions taken by defendant must stem from plaintiff's membership in the class. Lessman v. McCormick, 591 F.2d 605, 608 (10th Cir. 1979). Here, the plaintiff has chosen to define the classes as a group of persons seeking to organize a union and a group reporting safety violations at their place of employment to the Atomic Energy Corporation. Consequently, to support a section 1985(3) claim, the trial court would be required to find that the defendants (primarily management personnel of Kerr-McGee) took discriminatory action against employees because of their status as members of the groups described above. Adjudication of these issues would necessarily duplicate the critical issues underlying a claim before the NLRB based on sections 7 and 8 of the NLRA. *See* Iowa Beef Processors, Inc. v. Gorman, 476 F. Supp. 1382 (N.D. Iowa 1979). Inherent in both cases is a required finding that workers were discriminated against by their employer for being members of an organization engaging in concerted activities for the purpose of collective bargaining or other mutual aid or protection. The administrative interference created by this overlapping jurisdiction has been held in at least one case to require preemption of federal court jurisdiction. *Id. See also,* Bova v. Pipefitters Local 60, 554 F.2d 226 (5th Cir. 1977). Moreover, a recent Supreme Court decision has held this third criterion is the critical inquiry of the case. Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180, 197 (1978).

While these tests may prove adequate in most cases, the preemption question still turns upon a "balanced inquiry

into such factors as the nature of the federal and state interests in regulation and the potential for interference with federal regulation." Farmer v. United Brotherhood of Carpenters, 430 U.S. at 300. The court must discern the intent of Congress in resolving the issue. *See* Vaca v. Sipes, 386 U.S. at 179. The federal interest involved in this case is paramount since it is alleged that defendants deprived Silkwood of her constitutional right to travel by endangering her life and safety on the public highway[4] and that government officials conspired to deprive private citizens of their constitutional rights. Additionally, the actions allegedly taken by the private persons could constitute "official lawlessness" because of the alleged conspiracy with government officials. *See* United States v. Price, 383 U.S. 787, 794-95 (1966). Entrusting the exclusive power of vindicating these constitutional rights to the NLRB, which may refuse to hear a case at will, raises grave constitutional implications, *see* Vaca v. Sipes, 386 U.S. at 182-83, heightened by the NLRB's lack of expertise in constitutional matters, a field traditionally reserved to the courts. Seay v. McDonnell Douglas Corp., 427 F.2d 996, 1002-03 (9th Cir. 1970). Moreover, the NLRB lacks jurisdiction over government officials charged as defendants in this case, *see* Fulton v. Emerson Electric Co., 420 F.2d 527, 530 (5th Cir. 1969), *cert. denied,* 398 U.S. 903 (1970), and lacks power to award damages against any of these parties for redress of these constitutional infringements. Ruling that the Board has exclusive jurisdiction in this area would give free rein to government officials and private parties acting in concert with them to violate the constitutional rights of others with impunity.

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[4]No state action is required to give rise to a cognizable suit in this context. Griffin v. Breckenridge, 403 U.S. at 105-06.

Congress could not have intended such a result. We therefore hold that jurisdiction is proper in this case.

Section 1985(3)

Plaintiff contends the complaint sufficiently states causes of action under 42 U.S.C. § 1985(3). The district court found the complaint lacking because the class-based animus was directed toward a group "which did not tend to exist prior to the occurrence of the events set forth in the complaint and which [tended] to be defined by one particular activity or by plaintiff's individual situation." 460 F. Supp. at 407.

Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971), defines the requisites of a valid complaint under § 1985(3). One requirement is that the conspiracy be formed "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." *Id.* Read literally the statute has nearly unlimited application to private conspiracies designed to deprive persons of the equal protection of the law. To avoid construing the statute as a general federal tort law and to effectuate the purposes of Congress, the Court limited the Act's application by requiring as an element of the cause of action "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* at 102.

Other courts considering the viability of § 1985(3) actions for conspiracies against unions have uniformly found insufficient class-based animus. Taylor v. Brighton Corp., 616 F.2d 256 (6th Cir. 1980); Iowa Beef Processors, Inc. v. Gorman, 476 F. Supp. 1382; Amalgamated Clothing and Textile Workers Union v. J.P. Stevens &

Co., Inc., 475 F. Supp. 482 (S.D.N.Y. 1979). Similar rulings have been made in cases of employees claiming discrimination by unions and/or employers. Bova v. Pipefitters Local 60, 554 F.2d 226; McLellan v. Mississippi Power & Light Co., 545 F.2d 919 (5th Cir. 1977) Western Telecasters v. California Federation of Labor, 415 F. Supp. 30 (S.D. Cal. 1976).

Even if a union or group which has particular views on nuclear safety can be a class within the meaning of section 1985(3), no cause of action is stated here. The complaint must show "invidiously discriminatory animus" on the part of defendants. Griffin v. Breckenridge, 403 U.S. at 102. At least one court has found this requires a showing of "a considerable degree of unjustifiability or irrationality." McLellan v. Mississippi Power & Light Co., 526 F.2d 870, 879 (5th Cir. 1976), *vacated in part on other grounds en banc* 545 F.2d 919. Another court has required a showing of an "irrational and odious class discrimination akin to racial bias – such as discrimination based on national origin or religion." Arnold v. Tiffany, 359 F. Supp. 1034, 1036 (C.D. Cal.), *aff'd on other grounds,* 487 F.2d 216, 218 (9th Cir. 1973), *cert. denied,* 415 U.S. 984 (1974). Senator Edmunds, in describing the types of conspiracies coming within the purview of the Act, explained:

> We do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or set of men against another to prevent one getting an indictment in the State courts against men for burning down his barn; but, if in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please or because he was Catholic, or because he was a Methodist, or

> because he was a Vermonter, . . . then this section could reach it.

Cong. Globe, 42d Congress, 1st Sess. 567 (1871).

To state a cause of action under section 1985(3) the law requires prejudice against a class *qua* class. Here it seems clear from the complaint as a whole that the feud, if there is one, is private; no general prejudice which transcends the immediate dispute is shown. Rather the hatred which defendants allegedly harbor is against Karen Silkwood and her associates arising out of the activities of parties involved. *See* Lessman v. McCormick, 591 F.2d 605, 608 (10th Cir. 1979). We hold this is essentially a private feud not within the intended scope of the Act's coverage. As was aptly stated by the district court, to hold otherwise would make § 1985(3) "applicable to all conspiratorial interferences with the rights of others, as there are no bounds upon the ingenuity of counsel in pleading novel and diverse classes to fit every conceivable situation." 460 F. Supp. at 407.

The Bivens Claim

The district court granted summary judgment on the *Bivens* claim against plaintiffs because the FBI allegedly became involved in the conspiracy only after the death of Karen Silkwood and, therefore, could not have violated her rights. Plaintiffs urge that the FBI defendants, by joining a conspiracy with knowledge of its illegal purpose, ratified and became liable for the conspirators' prior acts.

The conspiracy's alleged purpose was two-fold: to violate the rights of Silkwood and others, and to cover up these violations. We agree with the Ninth Circuit that the civil rights of a person cannot be violated once that person

has died. Guyton v. Phillips, 606 F.2d 248, 250-51 (9th Cir. 1979), *cert. denied,* 445 U.S. 916 (1980). *See also* Whitehurst v. Wright, 592 F.2d 834, 840-41 (5th Cir. 1979); Roe v. Wade, 410 U.S. 113, 157-59 (1975) (unborn fetus not a "person" for purposes of Civil Rights Act). It is clear then that the FBI agents could not have violated the civil rights of Silkwood by cover-up actions taken after her death.

Additionally, with the death of Silkwood, the conspiracy to violate her rights terminated. Thus, the FBI defendants could not be held liable for the *prior* violations of Silkwood's constitutional rights even if a *Bivens* claim encompasses a relation back theory of conspiracy law. Guyton v. Phillips, 606 F.2d at 251.

We hold that the plaintiffs have not stated a cause of action under the Civil Rights Act of 1871 or the Constitution of the United States and the district court's dismissal was proper.

Affirmed.

APPENDIX B
THE CIRCUIT COURT'S ORDER REFUSING REHEARING

APPENDIX B

THE CIRCUIT COURT'S ORDER REFUSING REHEARING

NOVEMBER TERM – January 16, 1981

Before Honorable Robert H. McWilliams, Honorable William E. Doyle and Honorable James K. Logan, Circuit Judges.

KAREN G. SILKWOOD, by the Administrator of her estate, WILLIAM M. SILKWOOD; and BEVERLY K. MEADOWS, MICHAEL E. MEADOWS, and DAWN E. MEADOWS, the infant heirs of Karen G. Silkwood by their Guardian, WILLIAM E. MEADOWS,
Plaintiffs-Appellants,

COMMITTEE FOR PUBLIC JUSTICE,
Amicus Curiae,

v.

THE KERR-McGEE CORPORATION; DEAN A. McGEE, JAMES J. KELLY, PETER COLEFAX, EARL M. JORGENSEN, EDWIN L. KENNEDY, BREENE M. KERR, ROBERT S. KERR, JR., F.C. LOVE, GEORGE B. PARKS, J.B. SAUNDERS, A.P.F. SEALE, JAMES E. WEBB, R.T. ZITING, PARKER S. DUNN, WAYNE NORWOOD, RONALD ADKISSON, ROY E. KING, G.T. SINKE, J. MARLER, G. FRANCE, JAMES READING, FRED WELCH, W.C. GENTRY, LAWRENCE OLSON, THEODORE ROSACK, JACQUE SPROUJI, and ONE NAMED BUT UNIDENTIFIED AGENT OF THE FEDERAL BUREAU OF INVESTIGATION,
Defendants-Appellees.

No. 78-1826 and No. 79-1014

This matter comes on for consideration appellants' petition for rehearing filed in the captioned appeals.

Upon consideration whereof, the petition is denied.

HOWARD K. PHILLIPS, Clerk

APPENDIX C

THE CIRCUIT COURT'S ORDER RECALLING ITS MANDATE AND REFUSING REHEARING

APPENDIX C

THE CIRCUIT COURT'S ORDER RECALLING ITS MANDATE AND REFUSING REHEARING

MARCH TERM – APRIL 6, 1981

Before Honorable Robert H. McWilliams, Honorable William E. Doyle and Honorable James K. Logan, Circuit Judges.

KAREN G. SILKWOOD, by the Administrator of her estate, WILLIAM M. SILKWOOD; and BEVERLY K. MEADOWS, MICHAEL E. MEADOWS, and DEAN E. MEADOWS, the infant heirs of Karen G. Silkwood by their Guardian, William E. Meadows, *Plaintiffs-Appellants,*	)	
COMMITTEE FOR PUBLIC JUSTICE, *Amicus Curiae,*	)	
v.	)	No. 78-1826
THE KERR-McGEE CORPORATION; DEAN A. McGEE; JAMES J. KELLY; PETER COLEFAX; EARL M. JORGENSEN; EDWIN L. KENNEDY; BREENE M. KERR; ROBERT S. KERR; JR., F.C. LOVE; GEORGE B. PARKS; J.B. SAUNDERS; A.P.F. SEALE; JAMES E. WEBB; R.T. ZITING; PARKER S. DUNN; WAYNE NORWOOD; RONALD ADKISSON; ROY E. KING; G.T. SINKE; J. MARLER; G. FRANCE; JAMES READING; FRED WELCH; W.C. GENTRY; LAWRENCE OLSON; THEODORE ROSACK; JACQUE SPROUJI; and ONE NAMED BUT UNIDENTIFIED AGENT OF THE FEDERAL BUREAU OF INVESTIGATION, *Defendants Appellees.*	)	and No. 79-1014

This matter comes on for consideration appellants' motion to recall the mandate and reenter the order denying petition for rehearing in the captioned cases.

Upon consideration whereof, the motion is granted. The Court orders as folows:

1. The mandate in the captioned cases issued January 16, 1981, to the United States District Court for the Western District of Oklahoma is recalled;

2. The Court's order of January 16, 1981, denying appellants' petition for rehearing is vacated and reentered this date;

3. The Clerk is directed to reissue the mandate in these cases forthwith.

HOWARD K. PHILLIPS
Clerk

By:
Robert L. Hoecker
Chief Deputy Clerk

APPENDIX D
THE DISTRICT COURT'S OPINION BELOW

APPENDIX D

THE DISTRICT COURT'S OPINION BELOW

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

KAREN G. SILKWOOD, by the Administrator of her estate, William M. Silkwood, et al., *Plaintiffs,*

vs.

THE KERR-McGEE CORPORATION, et al., *Defendants.*

CIV-76-0888-Theis

FILED
SEP 25 1978
HERBERT T. HOPE
U.S. DISTRICT COURT
By _____ Deputy

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on the motions of the individual Kerr-McGee defendants[1] for judgment on the pleadings and the motions of the F.B.I. defendants[2] and defendant Jacque Srouji, for summary judgment.

[1] The term "individual Kerr-McGee defendants" refers to the following officers, directors, executives and employees of the Kerr-McGee Corporation named in the complaint as defendants solely in their personal capacities: Dean A. McGee; James J. Kelly; Peter Colefax; Earl M. Jorgensen; Edwin L. Kennedy; Breene M. Kerr; Robert S. Kerr, Jr.; F.C. Love; George B. Parks; J.B. Saunders; A.P.F. Seale; James E. Webb; R.T. Ziting; Parker S. Dunn; Wayne Norwood; Ronald Adkisson; Roy E. King; G.T. Sinke; J. Marler; G. France; James Reading; Fred Welch; and Weldon C. Gentry.

[2] The term "F.B.I. defendants" refers to the following agents of the Federal Bureau of Investigation named in plaintiffs' complaint as defendants in their private as well as in their official capacities: Lawrence Olson; Theodore Rosack; and "One Named but Unidentified Agent of the Federal Bureau of Investigation."

Defendants maintain the first two counts[3] of plaintiffs' complaint fails to state a cause of action upon which relief can be granted under 42 U.S.C. § 1985(3) because: (1) the complaint fails to allege, and it cannot be implied, that there was some racial, or perhaps otherwise class-based discriminatory animus behind the alleged conspiracy; and (2) the complaint fails to allege or imply any form of state action, a violation of Thirteenth Amendment rights, or a violation of the right of interstate travel.[4] The F.B.I. defendants move for summary judgment on the first two counts and on any implicit *Bivens*[5] claims, arguing the complaint is deficient in the manner stated above, and further, that the F.B.I. defendants came on the scene only after the death of Karen Silkwood in November of 1974, that any alleged conspiracy would have terminated at the time of Silkwood's death, and that it was impossible for the F.B.I. defendants to have done anything that would have harmed Karen Silkwood during her lifetime either in her person or property, or in her having or exercising any right or privilege of a citizen of the United States.

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[3]This opinion will consider only the first two counts set forth in plaintiffs' complaint. Motions relating to the third count of the complaint which names as defendant only the Kerr-McGee Corporation will be considered in subsequent opinions and orders.

[4]Because of the dispositive nature of this contention, the Court finds it unnecessary to reach defendants' arguments relating to finds it unnecessary to reach defendants' arguments relating to the survivability of the action under Oklahoma law and to the jurisdiction of the National Labor Relations Board.

[5]*Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 29 L.Ed.2d 619, 91 S.Ct. 1999 (1971). Very simply the *Bivens* case held the violation of a citizen's constitutional right by a federal officer gave rise to a cause of action for damages to a person injured by the unconstitutional conduct of the federal officer. In that case, the Fourth Amendment right to be free from unreasonable search and seizure was violated.

After careful consideration of the complex legal issues presented by the motions, the Court concludes that Counts I and II of plaintiffs' complaint fail to state a cause of action and are therefore dismissed as to all defendants. The F.B.I. defendants are granted summary judgment on the *Bivens* aspect of plaintiffs' complaint, but are denied summary judgment as to Counts I and II.

BACKGROUND

The complaint states that Karen Silkwood was an employee of the Kerr-McGee Corporation's Cimarron, Oklahoma, Nuclear Facility (hereinafter "Cimarron facility") from August 3, 1972, to November 13, 1974, The first count of the complaint alleges that the individual Kerr-McGee defendants entered into a conspiracy in November of 1972 with the purpose of preventing Karen Silkwood and other Cimarron facility employees endeavoring to organize a labor union to improve their working standards from enjoying the equal rights, privileges and immunities of citizens under the laws of the United States and the State of Oklahoma, through force, violence, intimidation, surveillance, harassment, wiretapping and other forms of illegal conduct. Overt acts alleged to have been undertaken by the individual Kerr-McGee defendants against Karen Silkwood and other union organizers employed at the facility include the following: (1) formulating, financing, directing, supervising and executing a plan to place Karen Silkwood and other union organizers employed at the Cimarron facility under surveillance so as to compile dossiers for the purpose of depriving them of their rights to privacy and to freely associate as guaranteed by the First and Fourth Amendments to the United States Constitution; (2) similarly undertaking a plan to place listening

devices in private places and placing wiretaps on the telephones of Karen Silkwood and other union organizers in violation of privacy rights guaranteed by the First and Fourth Amendments; (3) hiring and directing operations agents to place Karen Silkwood and other union organizers under surveillance, to illegally enter the private domains of Karen Silkwood and other union organizers, and to harass Karen Silkwood and other union organizers by various means – including harassment of the freedom of movement and travel – for the purpose of preventing them from enjoying the equal protection of the laws entitling them to freely associate; (4) firing and transferring persons at the Cimarron facility as punishment for their exercise of First Amendment rights, and to prevent Karen Silkwood and other union organizers from enjoying the equal protection of the laws; (5) interfering with the right of Karen Silkwood and other Cimarron employees to communicate with the public news media by threats of firing, use of lie detector tests, and by orders and rules forbidding such conduct.

The F.B.I. defendants are alleged to have joined the conspiracy in November of 1974, and defendant Srouji is alleged to have joined in April of 1975, each with the knowledge of the previous overt acts, for the purpose of preventing knowledge of the overt acts from becoming known to any persons other than themselves. All defendants are alleged to have given false information to various federal investigative officials and to have falsified official reports for the purpose of depriving Karen Silkwood and other union organizers of the equal protection and enjoyment of the laws of the United States.

As a result of the alleged overt acts, the complaint states that Karen Silkwood and other union organizers employed at the Cimarron facility were damaged in that they were

deprived of the equal protection of the laws and deprived of the privileges and immunities of citizens of the United States, including their rights to freedom of speech, freedom of association, freedom of assembly, freedom of movement and travel, their free access to the press, their right to privacy, their right to petition their government for a redress of their grievances, and their right not to be deprived of their life, liberty or property other than by the due process of law.

The second count of the complaint is identical to the first count except for two essential differences. First, the alleged conspiracy in the second count is stated to have been directed against Karen Silkwood and other employees of the Cimarron facility who had filed complaints against the corporation under the Atomic Energy Act. Second, the individual Kerr-McGee defendants are alleged to have entered into the conspiracy in October of 1974. Jurisdiction as to both Counts I and II is asserted under 42 U.S.C. § 1985(3), 28 U.S.C. § 1343, and the First, Fourth, Fifth and Ninth Amendments to the United States Constitution.

SECTION 1985(3)

Counts I and II are predicated upon what has been called the Klu Klux Klan Act, a provision of the Civil Rights Act of 1871, which provides as follows:

> "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . [and] in any case of con-

> spiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators." [42 U.S.C. § 1985(3).]

The touchstone in any case involving a claim under § 1985(3) is the decision of the Supreme Court in *Griffin v. Breckenridge*, 403 U.S. 88, 29 L.Ed. 338, 91 S.Ct. 1790 (1971), where the Court set forth the following as the necessary elements of a § 1985(3) claim:

> "To come within the legislation a complaint must allege that the defendants did (1) 'conspire or go in disguise on the highway or on the premises of another' (2) 'for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws.' It must then assert that one or more of the conspirators (3) did or caused to be done, 'any act in furtherance of the conspiracy,' whereby another was (4a) 'injured in his person or property' or (4b) 'deprived of having and exercising any right or privilege of a citizen of the United States." [403 U.S. at 102-103.]

The second element set forth above relating to the motivation of the conspirators which must be alleged and

proven by a § 1985(3) claimant was further defined in the Court's decision in *Griffin* in light of the legislative history and the Constitution. Justice Stewart stated:

> "It is thus evident that all indicators – text, companion provisions, and legislative history – point unwaveringly to § 1985(3)'s coverage of private conspiracies. That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others. For, though the supporters of the legislation insisted on coverage of private conspiracies, they were equally emphatic that they did not believe, in the words of Representative Cook, 'that Congress has a right to punish an assault and battery when committed by two or more persons within a State.' [Citation omitted.] The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose – by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment . . . . The language requiring intent to deprive of *equal* protection or *equal* privileges and immunities, means there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirator's action." [Id. at 101-102.]

The complaint before the Court satisfies the requirements of the first and third elements of a § 1985(3) action. Although defendants deny by answer and affidavit

the allegations of a conspiracy and of overt acts, they concede the complaint alleges these essential elements. What defendants do dispute, however, is whether the class-based animus essential to a § 1985(3) claim is present in the complaint and whether the complaint alleges the deprivation of any of the rights or privileges of a citizen of the United States.

CLASS-BASED ANIMUS

There is no allegation of racial animus or even of sex discrimination in this case. The class-based animus in Count I is alleged to have been directed against union organizers employed at the Cimarron facility. In Count II, the class-based animus is alleged to have been directed against employees of the Cimarron facility who had filed complaints against their employer under the Atomic Energy Act. In their arguments and briefs, plaintiffs stress that these constitute two separate and distinct classes — Karen Silkwood having been a member of each — and that both classes were "targeted" by defendants for deprival of the equal protection of the laws and for deprival of the members' privileges and immunities as citizens of the United States. Plaintiffs contend that a labor union or any other formal or informal organization gathered together to better enable persons to more effectively exercise rights guaranteed by the First Amendment could constitute a class for the purposes of § 1985(3), no matter how narrowly defined, if they were "targeted" by a private conspiracy in the manner alleged by the complaint.

Defendants respond that the classes alleged in Counts I and II are small, not readily identifiable, and have constituencies depending upon circumstances which are changeable. It is contended that the alleged classes are

defined by the activities of the members which are distinctly individual characteristics, rather than by intrinsic characteristics or qualities such as race, ethnic origin, sex or religion. To hold that such classes are within the ambit of § 1985(3) would be to fashion that section into a general federal tort law, according to defendants.

Under the law of this Circuit it is clear that the complaint must show some racial or class-based invidiously discriminatory animus behind the actions of the conspirators. *Atkins v. Lanning,* 556 F.2d 485, 489 (10th Cir. 1977); *Ward v. St. Anthony Hospital,* 476 F.2d 671, 676 (10th Cir. 1973). In *Griffin* the Supreme Court emphasized:

> "The motivation aspect of § 1985(3) focuses not on scienter in relation to deprivation of rights but on invidiously discriminatory animus." [403 U.S. at 102, n. 10.]

The Ninth Circuit has further explained this requirement in the following manner:

> "The statutory action is restricted to injuries inflicted upon the victim because of his status as a member of an identifiable class; the statutory 'purpose to deprive of equal rights' requirement is inferred from the racial or other class motivation underlying the tortious conduct.
>
> * * *
>
> "Under *Griffin,* we think *the class providing the motivating animus must be created by a fact other than the possession of the right deprived — otherwise virtually every conspiratorial deprivation of a primary right would be actionable under § 1985(3) . . .*" [Emphasis added.] [*Lopez*

v. Arrowhead Ranches, 523 F.2d 924, 927-928 (9th Cir. 1975).]

Although the Supreme Court was not called upon in *Griffin* to determine whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under § 1985(3), it did cite the remarks of Senator Edmunds[6] during the congressional debate of the passage of the Civil Rights Act of 1871. 403 U.S. at 103, n. 9. Plaintiffs, in their brief, also direct the Court's attention to that portion of the debate. Asked whether the section dealing with conspiracy to obstruct justice [now codified as § 1985(2)] was intended to embrace the states, Senator Edmunds replied:

> "Certainly, referring to the 'equal and impartial course of justice' mentioned in the second section of the third page. This obstruction of the equal and impartial course of justice, however, must, under the provisions of this bill, go so far as to deny and withhold from citizens of the United States that equality of protection in seeking justice which the Constitution of the United States gives them. We do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or set of men against another to prevent one getting an indictment in the State courts against men for burning down his barn; but, if in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Catholic, or because

[6]Senator Edmunds was a Republican from Maine.

> he was a Methodist, . . . then this section could reach it." [Cong. Globe, 42d Congress, 1st Sess. 567 (1871) (remarks of Senator Edmunds).]

Certainly, it is clear that the 1871 Congress did consider the possibility that § 1985 would be applied in general to classes of citizens other than racial groups and in particular to religious groups. Since *Griffin*, federal courts have not hesitated in extending the protection of § 1985(3) to religious groups. See *Marlowe v. Fisher Body*, 489 F.2d 1057 (6th Cir. 1973) (employment discrimination against a member of the Jewish faith); *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971) (disruption of religious services at a predominently white Catholic parish). Similarly, several federal courts have found allegations of sex discrimination to be actionable class-based bias under § 1985(3). See *Reichert v. Payne*, 396 F.Supp. 1010 (N.D. Cal. 1975); *Pendrell v. Chatham College*, 370 F. Supp. 494 (W.D. Pa. 1974); *Stern v. Massachusetts Indemnity & Life Ins. Co.*, 365 F. Supp. 433 (E.D. Pa. 1973). But, *c.f.*, *Cohen v. Illinois Institute of Technology*, 524 F.2d 818 (7th Cir. 1975), cert. denied, 425 U.S. 943 (1976).

On the other hand, most courts have not perceived class-based animus for purposes of § 1985(3) in cases involving allegations of classes that were not readily recognizable or that tended to be defined by one particular activity or by plaintiff's individual situation and that were not traditionally among those groups protected by the civil rights laws. See *Bova v. Pipefitters & Plumbers Local 60, AFL-CIO*, 554 F.2d 226 (5th Cir. 1977) (non-union employee); *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977) (en banc) (bankrupts); *Bricker v. Crane*, 468 F.2d 1228 (1st Cir. 1972) (physicians who had testified in malpractice cases), cert. denied, 410 U.S. 930 (1973); *Jacobson v. Industrial Foundation of the*

Permian Basin, 456 F.2d 258 (5th Cir. 1972) (persons filing workman's compensation claims); *Western Telecasters, Inc. v. California Federation of Labor, AFL-CIO*, 415 F. Supp. 30 (S.D. Cal. 1976) (employees of a "non-union" employer entity); *Taylor v. Nichols*, 409 F. Supp. 936 (D.Kan. 1976) (policemen), aff'd. on other grounds, 558 F.2d 561 (10th Cir. 1977); *Smith v. Armstrong*, 396 F. Supp. 753 (N.D. Tex. 1975) (persons whose families have been disrupted by a particular religious cult), aff'd. without opinion, 524 F.2d 1231 (5th Cir. 1975); *Furumoto v. Lyman*, 362 F. Supp. 1267, 1286 (N.D. Ca. 1973) (non-white opponents of racism and disrupters of university operations for social or political reasons). But see, *e.g., Glasson v. City of Louisville*, 518 F.2d 899, 912 (6th Cir. 1975) (persons displaying posters or signs critical of President Nixon during a motorcade), cert. den., 423 U.S. 930 (1975); *Cameron v. Brock*, 473 F.2d 608 (6th Cir. 1973) (supporters of an incumbent sheriff's election opponent); *Azar v. Conley*, 4546 F.2d 1382 (6th Cir. 1972) (members of a white middle class family harassed by police);[7] *Brown v. Villanova University*, 378 F. Supp. 342 (E.D.Pa. 1974) (students exercising their First Amendment rights);[8] *Franceschina* v. *Morgan*, 346 F. Supp. 833 (persons engaged in First Amendment activities at migrant labor camp).[9]

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[7]All three of the cases cited from the Sixth Circuit included a component of state action, and *Glasson* and *Azar* contained claims held actionable under 42 U.S.C. § 1983.

[8]The Court held there was a substantial probability plaintiffs would prevail on the merits and therefore granted a preliminary injunction.

[9]The *Franceschina* opinion suggests but does not determine the presence of state action.

In the context of the first count's allegation of a class-based animus directed against union organizers employed at the Cimarron facility, a case of particular interest is *Arnold v. Tiffany*, 359 F. Supp. 1034 (C.D. Cal. 1973). There, plaintiffs who were attempting to form and maintain an association of independent newspaper dealers, brought an action under § 1985(3) against the publisher, seven of its employees, and a dealer. The animus was alleged to have been directed against the class of newspaper dealers who had independent contracts with the newspaper. The Court dismissed the complaint for failure to state a claim upon which relief could be granted, and provided the following rationale:

> "A close reading of *Griffin* leads this Court to conclude that the words 'class-based, invidiously discriminatory animus' refer, at most, to that kind of irrational and odious class discrimination akin to racial bias – such as discrimination based on national origin or religion. The complaint alleges no such discrimination.
>
> "Furthermore, for this Court to conclude that § 1985(3) was intended to embrace the class alleged here – a newspaper dealers' trade asociation – would, in effect, amount to treating that section as a general federal tort law." [Id. at 1036.]

On appeal, the Ninth Circuit upheld the trial court's dismissal on the basis that the appellants were injured because of their activities in attempting to maintain a dealer association and not because they were members of the class alleged, i.e., newspaper dealers. The Court of Appeals therefore found it unnecessary to reach the "class" question on which the district court based its deci-

sion. *Arnold v. Tiffany*, 487 F.2d 216, 218 (9th Cir. 1973), cert. denid, 415 U.S. 984 (1974).[10]

With respect to the second count's allegation of a class-based animus directed against employees of the Cimarron facility who had filed complaints against their employer under the Atomic Energy Act, a case of interest is *Hughes v. Ranger Fuel Corp.*, 467 F.2d 6 (4th Cir. 1972). Plaintiffs were engaged in efforts to "turn in" violators of the 1899 Refuse Act and alleged that they had been assaulted while they endeavored to photograph the pollution of a river by defendants. The district court had dismissed the case without an opinion, and the Fourth Circuit affirmed on the basis that plaintiffs had failed to allege class-based motivation on the part of the defendants as required in a § 1985(3) claim. Judge Russell states:

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[10] Judge Tuttle of the Fifth Circuit, sitting by designation, continues in *Arnold* with the following comments:

> "The element (4b) necessary for a cause of action under *Griffin* requires the appellants to be 'deprived of having and exercising any right or privilege of a citizen of the United States.' [403 U.S. at 103, 91 S.Ct. at 1799.] The appellants assert a deprivation of their first amendment right of association. Since the first amendment has not been held to be a restraint on *private* conduct, only on state action, the appellants suggest two novel arguments for sustaining their right. First, the appellants would argue that the elimination of the state action requirement by *Griffin* extends the right of association under the first amendment as a bar against private interference as well as state action in Section 1985(3) suits. Second, appellants assert that the right of association is one of that bundle of rights held by all persons who are *national citizens*. Since we have affirmed the district court's decision on the class-based animus limitation, it is unnecessary class-based animus limitation, it is unnecessary for us to reach these issues or the question of the constitutional power of Congress to enact such a statute." [Footnotes omitted.] [Id. at 219.]

"The action of the defendants was directed at the plaintiffs because they were engaged in attempting to photograph them (the defendants) and their activities on that particular occasion, not because of any animus against them as members of some class or race. There is no averment in the complaint that the defendants attacked the plaintiffs because the latter were environmentalists . . .; the allegations of the complaint are specific that the assault was sparked solely by the instant reaction of the defendants to the fact that the plaintiffs were seeking to photograph the defendants, clearly for the purpose of prosecuting them under the Refuse Act. Theirs was a purely spontaneous act, not alleged to be a part of any general pattern of discriminatory action directd to any class, as was the situation in *Action v. Gannon* [450 F.2d 1227 (8th Cir. 1971.)" [Id. at 10.]

Plaintiffs concede that both classes alleged are narrowly defined and tied to the particular circumstances of the claimed conspiracy. In *Bricker,* the plaintiff was denied leave by the district court to amend his complaint to state that he was a member of a class of physicians that had been discriminated against because of their testimony in malpractice cases. Judge McEntee observed:

"While the court denied his motion for leave to amend, this additional allegation would not, in any event, suffice to state a cause of action under § 1985(3). We recognize, of course, that we are generally required to treat the allegations of a complaint as true for purposes of a motion to dismiss. In the instant case, however, appelllant has done no more than flatly assert his member-

> ship in a novel class which is neither readily recognizable nor among those traditionally protected by the Civil Rights Act. He has alleged no facts supporting the existence of such a class and admitted at oral argument that he might be the only class-member in New Hampshire. Under these circumstances, we hold that appellant has not sufficiently alleged class-based discrimination to state a cause of action under § 1985(3). See *Jacobson v. Industrial Foundation of Permian Basin,* supra." [Id. at 1232-1233.]

Having fully considered the authorities set forth above as well as others recited by counsel in their briefs and arguments, this Court finds itself in agreement with the numerous courts who have rejected claims of class-based animus allegedly directed toward groups which did not tend to exist prior to the occurrence of the events set forth in the complaint and which tend to be defined by one particular activity or by plaintiff's individual situation. While animus directed against groups such as Jehovah's Witnesses, persons of Japanese origin, or Democrats, may provide the necessary motivation element, animus directed against employees at the Cimarron facility who were organizing a union or who had filed complaints against their employer under the Atomic Energy Act, does not. If the Court were to hold otherwise, § 1985(3) could become applicable to all conspiratorial interferences with the rights of others, as there are no bounds upon the ingenuity of counsel in pleading novel and diverse classes to fit every conceivable situation. Under the Supreme Court's construction of § 1985(3) in *Griffin,* this Court is constrained to hold that Counts I and II of the complaint do not allege an invidiously discriminatory animus and are therefore not actionable under 42 U.S.C. § 1985(3).

DEPRIVATION OF RIGHTS OR PRIVILEGES

Plaintiffs' complaint does not allege that Karen Silkwood was injured in her person or property by the overt acts specified in the complaint, but does allege that she was deprived of the equal protection of the laws and of her privileges and immunities as a citizen. Defendants suggest that since there is no component of state action alleged or suggested by the complaint, the interests of Karen Silkwood which are alleged to have been infringed by the overt acts do not fall within those protected by § 1985(3), a portion of a law passed to assist in the enforcement of the provisions of the Fourteenth Amendment. It is noted that the commands of that amendment are addressed only to the several states or to those acting under color of their authority. Defendants further contend that the Thirteenth Amendment-based, private conspiracy theory of recovery, permitted by the Supreme Court in *Griffin* is not available to plaintiffs, as it is not alleged that plaintiffs or Karen Silkwood are Negro citizens, descendants of former slaves, or that they have been the victims of racially discriminatory private action.

There is a line of Seventh Circuit cases which strongly support defendants' contentions. In *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972), the Court rejected § 1985(3) claim brought by a white lawyer with a successful criminal practice, who alleged that defendants had conspired to deny him access to a private office building as a tenant. The Court held that where there was no state involvement in the discrimination, an arbitrary business discrimination against lawyers engaged in the practice of criminal law did not deprive plaintiff of the equal protection of the laws within the meaning of § 1985(3). Judge (now Justice) Stevens stated:

> "The breadth of . . . [§ 1985(3)'s] coverage is yet to be determined, but three categories of protected rights have been plainly identified. *Griffin* gives express protection to a black citizen's Thirteenth Amendment rights and to his federal right to travel interstate; the title of the statute expressly identifies the third category, namely, rights protected by the Fourteenth Amendment. We think the § 1983 cases make it clear that in this third category a 'state involvement' requirement must survive *Griffin*.
>
> "Since plaintiff is white and claims no abridgement of his constitutional right to travel, the holding of *Griffin* does not control this case." (Footnotes omitted.) [Id. at 195.]

The case of *Cohen v. Illinois Institute of Technology*, 524 F.2d 818 (7th Cir. 1975), cert. denied, 425 U.S. 943 (1976), involved a claim of sex discrimination and conspiracy brought by a former female faculty member at a private university. The lower court's dismissal of the §§ 1983 and 1985(3) claims was affirmed on the grounds that with respect to the § 1983 claim, the complaint failed to sufficiently allege state action, and with respect to the § 1985(3) claim, the complaint failed to allege that the conspiracy had deprived plaintiff of a federally protected right. Judge (now Justice) Stevens made the following observation concerning the § 1985(3) claim:

> "Quite properly, Count II omits any allegation that the individual defendants acted under color of state law. For there is no statutory requirement of State participation or support for the conduct of the individual conspirators proscribed by § 1985(3). There is, however, a re-

quirement that the conspiracy deprive the plaintiff of a federally protected right. That requirement would be satisfied if I.I.T. were a State university, or if the constitutional right of the plaintiff at stake were one that is entitled to protection against anyone, rather than merely protection from impairment by a state.

"It is . . . well settled that the Fourteenth Amendment is not a protection against purely private interference and may be violated only by the action of a state. See, *e.g., Shelley v. Kraemer,* 334 U.S. 1, 92 L.Ed.2d 1161, 68 S.Ct. 836 . . . The rationale of *Dombrowski* is controlling here.

"We recognize, as plaintiff argues, that there is language in *Griffin* which may indicate that the statute will be construed to cover any invidiously discriminatory private conspiracy, and that other circuits, without careful consideration of the issue, have stated that state action is never an element of a § 1985(3) claim. We are satisfied, however, that the distinction between the two kinds of state involvement that may be relevant in civil rights litigation – first, whether the defendant has acted under color of state law, and, second, whether plaintiff's federal right is merely assertable against the State – requires consideration of the state action in cases bottomed on an alleged violation of the Fourteenth

"We have no doubt that discrimination which is invidious because of racial motivation would be

> covered since the protection of the Thirteenth Amendment is not merely against state action. But since the Court in *Griffin* so carefully refrained from holding that any discrimination which would be actionable if practiced by the State is for that reason also actionable under § 1985(3), we remain convinced that our reasoning in *Dombrowski* is a correct explanation of why the statute does not broadly 'apply to all tortious, conspiratorial interferences with the rights of others." (Citation and footnotes omitted.) [Id. at 828-829.]

The following year the Seventh Circuit heard the consolidated appeals in two § 1985(3) cases which had been dismissed for failure to state claims upon which relief could be granted. The cases involved a dismissed white high school teacher who claimed that a conspiracy had deprived him of his First Amendment rights to speak out on behalf of blacks and women, and a non-striking employee who had been assaulted in the course of an alleged conspiracy that deprived him of his right to freely associate with non-union workers and the right to attend and perform his job.

In *Murphy v. Mount Carmel High School,* 543 F.2d 1189 (7th Cir. 1976), the Court held that a § 1985(3) cause of action for injury arising out of a purely private conspiracy to interfere with freedom of expression, without state involvement, is not constitutionally supportable. Chief Judge Fairchild stated:

> "The guaranties of the First Amendment run only against the federal government, not private interference. By incorporation into the due process

clause of the Fourteenth Amendment, these guaranties also run against the state . . . .

"Appellants assert, however, that section 5 of the Fourteenth Amendment provides Congress with the power to enact legislation to implement the guaranties of this Amendment. Section 1985(3); they argue, was written to provide a cause of action against private conspirators invading an interest protected from state impairment by the Fourteenth Amendment.

"Neither the legislative history of the Amendment nor any holding of the Supreme Court supports this proposition.

"Faced with these precedents and inconclusive legislative history, we do not find in section 5 the constitutional authority which would permit Congress to enact a right of action against private parties, without any state involvement, for infringement of interests which are protected from state impairment by the Fourteenth Amendment." [Id. at 1193-1194.]

One other court of appeal has reached a similar conclusion. In *Bellamy v. Mason's Stores, Inc.*. 508 F.2d 504 (4th Cir. 1974), the Fourth Circuit upheld the dismissal of a § 1983(3) claim brought by a plaintiff who alleged that he had been fired by the defendant private employer for his membership in the Klu Klux Klan, and thus had been deprived of his First Amendment right of free association. Judge Craven offered the following analysis of the claim:

"Section 1985(3) creates civil liability against any persons who conspire to deprive any other person or class of persons of the 'equal protection

> of the laws, or of equal privileges and immunities under the laws.' The language of the statute tracks the language of the fourteenth amendment, and we know that included within it is a wholly private conspiracy to deny Negro citizens the right of travel and rights based upon the thirteenth amendment. *Griffin v. Breckenridge,* supra. But we think the language of equal protection chosen by the 1871 Congress cannot be interpreted to mean that persons who conspire without involvement of government to deny another person the right of free association are liable under this statute. This is so because the right of association derive from the first amendment — itself framed as a prohibition against the federal government and not against private persons, and because the incorporation doctrine has never been extended by the Supreme Court to apply to private persons." [Id. at 506-507.]

See also, *Doski v. M. Goldseker Co.,* 539 F.2d 1326 (4th Cir. 1976).

To the contrary, however, is the decision of the Eighth Circuit in *Action v. Gannon,* supra. There, the Court found jurisdiction under § 1985(3) to support the District Court's injunction against two organizations, the Black Liberation Front and Action, and their members, prohibiting them from continuing to disrupt the religious services of a predominantly white Catholic parish. The Court had no difficulty in concluding that the first section of the Fourteenth Amendment protected the plaintiffs' First Amendment rights of freedom of assembly and worship. Addressing the issue of whether those rights are protected only against state action, Judge Heaney stated:

"We think not. We believe that Congress was given the power in § 5 of the Fourteenth Amendment to enforce the rights guaranteed by the Amendment against private conspiracies.

"We reach this conclusion with some trepidation because a number of decisions of the Supreme Court, during the Reconstruction period, are frequently quoted as laying down the unqualified rule that 'if federal civil rights legislation is directed at merely "private acts,"' it must be denounced as unauthorized by the Fourteenth Amendment and hence unconstitutional unless some alternative constitutional authority for it can be established.

"Notwithstanding these early decisions, we feel the 1966 decision of the United States Supreme Court in *United States v. Guest*, 383 U.S. 745, 86 S.Ct. 1170, 16 L.Ed.2d 239, requires that we sustain the exercise of constitutional power here. We believe in doing so, we reach the result intended by the sponsors of the Fourteenth Amendment.

* * *

"While the Court in *Griffin* left the door open for a reexamination of *Guest*, we do not believe that it will reject the majority views expressed therein."
[Id. at 1235-1236.]

The Court's research unveils no subsequent Court of Appeals decision adopting the Eighth Circuit's holding in

Action.[11] It was expressly considered and rejected by the courts in *Dombrowski, Bellamy, Cohen* and *Murphy,* supra. The Court is aware that a number of opinions have expressed the view in dicta that state action is not essential to a claim under 42 U.S.C. § 1985(3) in light of *Griffin.* It appears, however, that these statements were not made or fully considered in the context of the narrower issue of claims that assert as injury solely a deprivation of rights or privileges of a United States citizen.[12] It is clear after *Griffin* that in actions for injury to persons or property, state or federal action may not be a necessary element to a § 1985(3) claim. It is also clear, however, that in actions for a deprivation of rights protected from infringement solely by state or federal authorities, some state or federal action that infringes plaintiffs' rights or results in unequal treatment may be necessary to state a claim.

With respect to *United States v. Guest,* supra, a case involving 18 U.S.C. § 241, the criminal analogue to § 1985(3), Judge (now Justice) Stevens offered the following analysis in *Dombrowski,* as follows:

> "The Court sustained the indictment of private citizens who had allegedly conspired to deny Negro citizens their right to equal utilization of public facilities operated by the State of Georgia. It is a fair distillation of the four opinions filed in that case to state that, although there was

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[11]The panel opinion in *Westberry v. Gilman Paper Co.,* 507 F.2d 206 (5th Cir. 1975), was ordered vacated and withdrawn prior to rehearing en banc by the Fifth Circuit because it appeared that the matters giving rise to the cause became moot. It is of no precedential value.

[12]See *Taylor v. Nichols,* 558 F.2d 561, 567 (10th Cir. 1977).

> disagreement within the Court on the question whether defendants' private conduct would have been proscribed if there had been no cooperative action by state officers, all members of the Court recognized the need for state involvement in the provision of facilities to which the victims of the conspiracy were denied equal access. In short, the right secured by the Equal Protection clause of the Fourteenth Amendment is a right to protection against unequal treatment by a state." [Id. at 195-196.]

In *Cohen,* Judge (now Justice) Stevens offered this additional observation regarding the application of *Guest* to § 1985(3):

> "It is clear that a private conspiracy to cause the plaintiff to receive unequal treatment from the State or from a State agency, would violate § 1985(3)."
> (524 F.2d at 828, n. 27.)

Plaintiffs contend that rights set forth in the First Amendment are among the rights, privileges and immunities of citizens of the United States and argue that they are no more dependent upon the Fourteenth Amendment than is the right to travel interstate recognized in the *Griffin* decision. The exercise of First Amendment rights is said to be protected from federal retaliation by the First and Fifth Amendments, from state retaliation by the Fourteenth Amendment, and from retaliation by private conspiracies by § 1985(3), enacted by Congress under its "power to protect by appropriate legislation." Thus, plaintiffs have argued in open court for a transposition of § 1985(3) into a cause of action for any private conspiratorial conduct that would also be actionable under

§ 1983, if undertaken by state officers or agents. This would render actionable virtually any private conduct that impairs an individual's speech, religious exercise or free association. To follow plaintiffs' proposition, however, would be to moot the line of Supreme Court cases that necessitate a finding of state action in § 1983 civil rights claims. Under plaintiffs' theory, these cases could be properly pleaded under § 1985(3), provided a conspiratorial element is present. None of the authorities cited by plaintiffs, most of which are discussed above, can be said to support this rather sweeping proposition. Even the opinion of the Eighth Circuit in *Action* rested its conclusion on the premise that Section 5 of the Fourteenth Amendment had given the Congress the power to enforce the right guaranteed by that amendment against private conspiracies.

Having thoroughly considered the authorities discussed above, as well as others recited by counsel in their extensive briefs and arguments, this Court finds the reasoning of the Fourth and Seventh Circuits compelling as it relates to the interests protected by § 1985(3). Aside from the absence of constitutional support for the position advocated by plaintiffs, this Court is persuaded that every controversy involving an alleged conspiratorial retaliation against persons exercising First Amendment rights should not sound a cause of action under § 1985(3). Under the blueprint established by the Constitution, most private tortious conduct is left to state regulation. To the extent that private conduct in retaliation for the exercise of First Amendment rights is not tortious, it is difficult to perceive how the private conduct may be penalized without impinging on the rights of the defendants. If changes need to be made in the laws, they should be accomplished by legislative means when constitutional authority exists for such action, and not by judicial fiat.

Thus, even if plaintiffs had alleged an invidiously discriminatory animus, their complaint would fail to state a complaint upon which relief can be granted because there is alleged no component of state action.[13]

BIVENS CLAIMS

On the face of the complaint it is not clear whether the F.B.I. defendants are alleged to have entered into the alleged conspiracy before or after the death of Karen Silkwood, inasmuch as Counts I and II allege that they joined the conspiracy "in November of 1974." During oral argument on the motions before the Court, Mr. Sheehan, counsel for the plaintiffs, stipulated that the F.B.I. defendants had no involvement in this case until after the death of Karen Silkwood.

It is therefore apparent that the F.B.I. defendants could not have violated the constitutional rights of Karen Silkwood during her lifetime. Accordingly, the F.B.I. defendats' motion for summary judgment on the *Bivens*

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[13]The majority in *Griffin* held, with the sole reservation of Justice Harlan, that the right to travel interstate is "among the rights and privileges of national citizenship" and is "assertable against private as well as governmental interference." *Griffin*, at 105-106. That right is therefore within the "power of Congress to protect by appropriate legislation from private infringement. Id. at 106. Plaintiffs here do not allege, nor have they claimed or argued that any overt act deprived Karen Silkwood of her right to travel interstate. See *e.g. Baer v. Baer*, 450 F. Supp. 481, 492 (N.D. Cal. 1978). Plaintiffs' attempt to argue that all First and Fourth Amendment rights are similarly "assertable against private as well as governmental interference," however desirable, is unfounded on the law and unpersuasive. As noted above, this interpretation would render virtually every tortious act an infraction of constitutional dimensions. This Court is bound to follow the Constitution as presently written and interpreted. It is not free to write a new Bill of Rights, notwithstanding plaintiffs' invitation.

aspect of plaintiffs' complaint should be granted. See *Roe v. Wade,* 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 705 (1975).

TERMINATION OF THE CONSPIRACIES

As a corollary matter, the F.B.I. defendants maintain that they are entitled to summary judgment as to Counts I and II of the complaint because any conspiracy alleged under § 1985(3) would have terminated at the death of Karen Silkwood as a matter of law. It is argued that a civil conspiracy cannot exist without an overt act which causes injury to plaintiff and that the conspiracy therefore terminated when Karen Silkwood could no longer be injured by any act of the defendants. No authority is cited for this proposition.

Plaintiffs respond that § 1985(3) makes all conspirators liable for civil damages resulting from the overt acts of any co-conspirator which have injured the plaintiff. It is clear that the statute makes no exceptions for conspirators who did not personally commit any overt act or who joined the conspiracy after the occurrence of the overt acts which injured plaintiff. Plaintiffs stress that they are not seeking damages for anything but the alleged overt acts which injured Karen Silkwood during her lifetime. It is also clear that conspiracy liability has been held to extend to persons who participated only in the concealment of the overt acts where it can be shown that they had full knowledge of the conspiracy and its unlawful purpose. See *Hudspeth v. McDonald,* 120 F.2d 962 (10th Cir. 1941).

The Court is unpersuaded by the F.B.I. defendants' arguments that a § 1985(3) conspiracy is different from a criminal conspiracy in that it must terminate as a matter of law upon the death of the plaintiff. Where a conspiracy

contemplates a continuity of purpose and a continuation of the performance of acts in furtherance of its express objectives, that single conspiracy continues in operation at law until there is a showing that the conspiracy has ended. See *United States v. Ethridge,* 424 F.2d 951 (6th Cir. 1970). Accordingly, the F.B.I. defendants' motion for summary judgment on the ground that it was impossible as a matter of law for them to have adopted the objectives of the conspiracy should be denied.

CONCLUSION

The motion of the F.B.I. defendants for summary judgment on the *Bivens* aspect of the plaintiffs' complaint is hereby granted. The motion of the F.B.I. defendants for summary judgment on Counts I and II is hereby denied.

Counts I and II of the plaintiffs' complaint are hereby dismissed as to all defendants for failure to state a claim upon which relief can be granted. Plaintiffs' pending motions relating to discovery under Counts I and II are rendered moot.

IT IS SO ORDERED at Wichita, Kansas, this 22nd day of September, 1978.

APPENDIX E
THE PETITIONERS' COMPLAINT BELOW

APPENDIX E

THE PETITIONER'S COMPLAINT BELOW

COMPLAINT
Nov. 5, 1976

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
_____X

KAREN G. SILKWOOD, by the Administrator of her estate, William M. Silkwood; and Beverly K. Meadows; Michael E. Meadows; and Dawn E. Meadows, the infant heirs of Karen G. Silkwood by their Guardian, William E. Meadows;

Plaintiffs,

CIVIL COMPLAINT
No.
76-0888-E
(Appellate #78-1826,)

v.

THE KERR-McGEE CORPORATION; DEAN A. McGEE; JAMES J. KELLY; PETER COLEFAX; EARL M. JORGENSEN; EDWIN L. KENNEDY; BREENE M. KERR; ROBERT S. KERR, JR.; F.C. LOVE; GEORGE B. PARKS; J.B. SAUNDERS; A.P.F. SEALE; JAMES E. WEBB; R.T. ZITTING; PARKER S. DUNN; WAYNE NORWOOD; RONALD ADKISSON; ROY E. KING; G.T. SINKE; J. MARLER; G. FRANCE; JAMES READING; FRED WELCH; W.C. GENTRY; (LAWRENCE OLSON; THEODORE ROSACK; JACQUE SROUJI; AND ONE NAMED BUT UNIDENTIFIED AGENT OF THE FEDERAL BUREAU OF INVESTIGATION,)

Defendants.
_____X

State of Oklahoma)
County of Oklahoma)

Comes now the complainant and alleges as follows;

Jurisdictional Statement

1. This is an action seeking legal recovery for the legal, physical, mental and property damage inflicted by the named defendants upon the plaintiff-decedent Karen G. Silkwood for the benefit of her estate and for the benefit of her three infant heirs. The injuries complained of herein are of two categories. The first category of injuries were inflicted by all of the individually-named defendants named herein by their willful actions undertaken pursuant to an illegal conspiracy designed and intended to deprive the plaintiff-decedent and other persons employed at the Kerr-McGee Nuclear Corporation's facility in Cimarron, Oklahoma, who were endeavoring to organize a legal union to improve working conditions at that facility or who had reported violations of the Atomic Energy Act to government authorities of the equal protection of the laws in violation of the laws of the United States and to illegally conceal this wrongdoing from those entitled to legal damages for this wrongdoing. The second category of injuries complained of were inflicted upon Karen Silkwood by the willful and wanton negligence of the defendant Kerr-McGee Corporation which was responsible for the safeguarding of special nuclear materials given over to this defendant by the United States government when these materials contaminated the plaintiff-decedent in her home and resulted in physical damages and mental anguish as well as physical damage to her property.

2. Jurisdiction is conferred on this court by Title 42 U.S.C. Section 1985(3); 28 U.S.C. § 1343 by the First, Fourth, Fifth and Ninth Amendments to the United States

Constitution; and by the pendant jurisdiction conferred upon this court by Title 28 U.S.C. Section 1331 et. seq. over the personal injury and property damage state cause of action which arises under Title 25, Sections 1 et. seq. Title 12, Sections 1041, et. seq. and Title 25, Sections 1 et. seq. of the Oklahoma Statutes Annotated which is predicated upon the same basic facts as underly the federal cause of action.

Parties to this Action
The Plaintiffs
Plaintiff # 1 — Karen G. Silkwood,
by the Administrator of her estate

3. Karen G. Silkwood, deceased, was a citizen of the State of Oklahoma and a citizen of the United States, who, from the date of August 3, 1972, to November 13, 1974, was an employee of the defendant Kerr-McGee Corporation employed at its Cimarron, Oklahoma facility located within the western District of Oklahoma and an active member of the Oil, Chemical and Atomic Workers International Union.

4. In this action, she is represented by her natural father, William M. Silkwood, a resident of the State of Texas, domiciled at 317 21st Street, Nederland, Texas, who was appointed as the Administrator of her estate on March 15, 1976, by Judge W.C. Kessler, Associate District Judge of the District Court of Oklahoma County, Oklahoma.

Plaintiffs #2, #3, and #4

5. Beverly Kristian Meadows; Michael Earl Meadows and Dawn Elaine Meadows, ages 9, 6 and 5 respectively are the three infant heirs of the plaintiff-deceased Karen G. Silkwood. They reside at Box 146 in Addington, Oklahoma, with their natural father.

6. In this action, the infant plaintiffs are represented by their natural father and guardian William E. Meadows of Box 146, Addington, Oklahoma.

The Defendants

Defendant #1 — The Kerr-McGee Corporation

7. The Kerr-McGee Corporation is a business corporation licensed to do business in the State of Oklahoma, with business offices and facilities located in Crescent and Oklahoma City, at the Kerr-McGee Center, 123 Robert S. Kerr Avenue, Oklahoma city, Oklahoma. This corporation is named as a party-defendant only in the negligence cause of action set forth herein.

Defendant #2 — Dean A. McGee

8. Dean A. McGee, residing at P.O. Box 25861, c/o Kerr-McGee Corporation, 123 Robert S. Kerr Avenue, Oklahoma City, Oklahoma, is the Chairman of the Board of Directors of the Kerr-McGee Corporation. He is sued herein, however, solely in his personal capacity — as an active member in the devising and execution of the illegal conspiracy to deprive the plaintiff Karen Silkwood and other workers at the Cimarron facility of the equal protection of the law and to conceal this wrongdoing from those entitled to legal damages for this wrongdoing by acts other than those in the normal course of his corporate duties.

Defendant # 3 — James J. Kelly

9. James J. Kelly, residing at P.O. Box 25861, c/o Kerr-McGee Corporation, 123 Robert S. Kerr Ave., Oklahoma City, Okla. is the President of the Board of Directors of the Kerr-McGee Corporation. He is sued herein, however, solely in his personal capacity — as an active member in the devising and execution of the illegal

conspiracy to deprive the plaintiff Karen Silkwood and other workers at the Cimarron facility of the equal protection of the law and to conceal this wrongdoing from those entitled to legal damages for this wrongdoing by acts other than those in the normal course of his corporate duties.

Defendant # 4 – Peter Colefax

10. Peter Colefax, residing at 1636 Moore Road, Montecito, Calif. 93108, was during 1974 and 1975, an active member in the devising and execution of the illegal conspiracy to deprive the plaintiff Karen Silkwood and other workers at the Cimarron facility of the equal protection of the law and to conceal this wrongdoing from those entitled to legal damages for this wrongdoing by acts other than those in the normal course of his corporate duties.

Defendant #5 – Earl M. Jorgensen

11. Earl M. Jorgensen, residing at 10650 South Alameda Blvd., Los Angeles, Calif. 90054, was during 1974 and 1975, an active member of the Board of Directors of the Kerr-McGee Corporation. He is sued herein, however, solely in his personal capacity – as an active member in the devising and execution of the illegal conspiracy to deprive the plaintiff Karen Silkwood and other workers at the Cimarron facility of the equal protection of the law and to conceal this wrongdoing from those entitled to legal damages for this wrongdoing by acts other than those in the normal course of his corporate duties.

Defendant #6 – Edwin L. Kennedy

12. Edwin L. Kennedy, residing at c/o Lehman Brothers, One William Street, New York City, New York 10004, was, during 1974 and 1975, an active member of the Board of Directors of the Kerr-McGee Corporation. He is sued herein, however, solely in his personal capacity

— as an active member in the devising and execution of the illegal conspiracy to deprive the plaintiff Karen Silkwood and other workers at the Cimarron facility of the equal protection of the law and to conceal this wrongdoing from those entitled to legal damages for this wrongdoing by acts other than those in the normal course of his corporate duties.

Defendant #7 — Breene M. Kerr

13. Breene M. Kerr, residing at Howell-Kerr Enterprises, 1000 City National Bank Tower, Oklahoma City, Okla. 73102, was, during 1974 and 1975, an active member of the Board of Directors of the Kerr-McGee Corporation. He is sued herein, however, solely in his personal capacity — as an active member in the devising and execution of the illegal conspiracy to deprive the plaintiff Karen Silkwood and other workers at the Cimarron facility of the equal protection of the law and to conceal this wrongdoing from those entitled to legal damages for this wrongdoing by acts other than those in the normal course of his corporate duties.

Defendant #8 — Robert S. Kerr, Jr.

14. Robert S. Kerr, Jr., residing at Kerr-Davis Lawfirm 600 Fidelity Plaza, Oklahoma City, Okla. 73102, was, during 1974 and 1975, an active member of the Board of Directors of the Kerr-McGee Corporation. He is sued herein, however, solely in his personal capacity — as an active member in the devising and execution of the illegal conspiracy to deprive the plaintiff Karen Silkwood and other workers at the Cimarron facility of the equal protection of the law and to conceal this wrongdoing from those entitled to legal damages for this wrongdoing by acts other than those in the normal course of his corporate duties.

Defendant #9 – F.C. Love

15. F.C. Love, residing at P.O. Box 25861, c/o Kerr-McGee Corporation, Kerr-McGee Center, 123 Robert S. Kerr Ave., Oklahoma City, Okla, was during 1974 and 1975, an active member of the Board of Directors of the Kerr-McGee Corporation. He is sued herein, however, solely in his personal capacity – as an active member in the devising and execution of the illegal conspiracy to deprive the plaintiff Karen Silkwood and other workers at the Cimarron facility of the equal protection of the law and to conceal this wrongdoing from those entitled to legal damages for this wrongdoing by acts other than those in the normal course of his corporate duties.

Defendant #10 – George B. Parks

16. George B. Parks, residing at P.O. Box 25861, c/o Kerr-McGee Corp., Kerr-McGee Center, 123 Robert S. Kerr Ave., Oklahoma City, Okla. was, during 1974 and 1975, an active member of the Board of Directors of the Kerr-McGee Corporation. He is sued herein, however, solely in his personal capacity – as an active member in the devising and execution of the illegal conspiracy to deprive the plaintiff Karen Silkwood and other workers at the Cimarron facility of the equal protection of the law and to conceal this wrongdoing from those entitled to legal damages for this wrongdoing by acts other than those in the normal course of his corporate duties.

Defendant #11 – J.B. Saunders

17. J.B. Saunders, residing at Bank of the Southwest Bldg., Houston, Texas 77001, was, during 1974 and 1975, an active member of the Board of Directors of the Kerr-McGee Corporation. He is sued herein, however, solely in his personal capacity – as an active member in the devis-

ing and execution of the illegal conspiracy to deprive the plaintiff Karen Silkwood and other workers at the Cimarron facility of the equal protection of the law and to conceal this wrongdoing from those entitled to legal damages for this wrongdoing by acts other than those in the course of his corporate duties.

Defendant #12 – A.P.F. Seale

18. A.P.F. Seale, residing at P.O. Box 25861, c/o Kerr-McGee Corp., Kerr-McGee Center 123 Robert S. Kerr Ave., Oklahoma City, Okla., was, during 1974 and 1975, an active member of the Board of Directors of the Kerr-McGee Corporation. He is sued herein, however, solely in his personal capacity – as an active member in the devising and execution of the illegal conspiracy to deprive the plaintiff Karen Silkwood and other workers at the Cimarron facility of the equal protection of the law and to conceal this wrongdoing from those entitled to legal damages for this wrongdoing by acts other than those in the normal course of his corporate duties.

Defendant #13 – James E. Webb

19. James E. Webb, residing at 1707 H Street, N.W., Suite 207, Washington, D.C. 20006, was, during 1974 and 1975, an active member of the Board of Directors of the Kerr-McGee Corporation. He is sued herein, however, solely in his personal capacity – as an active member in the devising and execution of the illegal conspiracy to deprive the plaintiff Karen Silkwood and other workers at the Cimarron facility of the equal protection of the law and to conceal this wrongdoing from those entitled to legal damages for this wrongdoing by acts other than those in the normal course of his corporate duties.

Defendant #14 – R.T. Zitting

20. R.T. Zitting, residing at 2404 Old Farm Road [E.], Oklahoma City, Okla., was the President of Kerr-McGee Corporation's Cimarron nuclear power subsidiary's plutonium division during 1974 and 1975. He is sued herein, however, solely in his personal capacity – as an active member in the devising and execution of the illegal conspiracy to deprive the plaintiff Karen Silkwood and other workers at Kerr-McGee's Cimarron facility of the equal protection of the law and to conceal this wrongdoing from those entitled to legal damages for this wrongdoing by acts other than those in the normal course of his corporate duties.

Defendant #15 Parker S. Dunn

21. Parker S. Dunn, residing at 3332 Quail Creek Road, Oklahoma City, Okla., was during 1974 and 1975, the Vice President of Kerr-McGee Corporation's Cimarron nuclear power subsidiary's plutonium division. He is sued, herein, however, solely in his personal capacity – as an active member in the devising and execution of the illegal conspiracy to deprive the plaintiff Karen Silkwood and other workers at thes Cimarron facility of the equal protection of the law and to conceal this wrongdoing from those entitled to legal damages for this wrongdoing by acts other than those in the normal course of his corporate duties.

Defendant #16 – Wayne Norwood

22. Wayne Norwood, residing at 420 Findlay Street [n], Norman, Okla., was, during 1974 and 1975, the Manager of Health and Safety for Kerr-McGee Corporation's Cimarron nuclear power subsidiary during 1974 and 1975. He is sued, herein, however, solely in his personal capacity

— as an active member in the devising and execution of the illegal conspiracy to deprive the plaintiff Karen Silkwood and other workers at the Cimarron facility of the equal protection of the law and to conceal this wrongdoing from those entitled to legal damages for this wrongdoing by acts other than those in the normal course of his corporate duties.

Defendant #17 — Ronald Adkisson

23. Ronald Adkisson, residing at 7008 Lyrewood Lane, Apt. 205, Oklahoma City, Okla., was, during 1974 and 1975, the Superintendant of Safety and Security at Kerr-McGee Corporation's Cimarron nuclear power subsidiary. He is sued, herein, however, solely in his personal capacity — as an active member in the devising and execution of the illegal conspiracy to deprive the plaintiff Karen Silkwood and other workers at the Cimarron facility of the equal protection of the law and to conceal this wrongdoing from those entitled to legal damages for this wrongdoing by acts other than those in the normal course of his corporate duties.

Defendant #18 — Roy E. King

24. Roy E. King, residing at 12322 Trail Oaks, Oklahoma City, Okla., was during 1974 and 1975, the Director of Personnel at Kerr-McGee Corporation's Cimarron nuclear power subsidiary. He is sued herein, however, solely in his personal capacity — as an active member in the devising and execution of the illegal conspiracy to deprive the plaintiff Karen Silkwood and other workers at the Cimarron facility of the equal protection of the law and to conceal this wrongdoing from those entitled to legal damages for this wrongdoing by acts other than those in the normal course of his corporate duties.

Defendant #19 – G.T. Sinke

25. G.T. Sinke, residing at 9513 Lakeshore Drive, The Village-Oklahoma City, Okla., was, during 1974 and 1975, the Coordinator of Health and Safety at Kerr-McGee's Cimarron nuclear power subsidiary. He is sued herein, however, solely in his personal capacity – as an active member in the devising and execution of the illegal conspiracy to deprive the plaintiff Karen Silkwood and other workers at the Cimarron facility of the equal protection of the law and to conceal this wrongdoing from those entitled to legal damages for this wrongdoing by acts other than those in the normal course of his corporate duties.

Defendant #20 – J. Marler

26. J. Marler, residing at 2517 Northwest 114th Terrace, Oklahoma City, Okla., was, during 1974 and 1975, the Manager of the plutonium plant of Kerr-McGee Corporation's Cimarron nuclear power subsidiary. He is sued herein, however, solely in his personal capacity – as an active member in the devising and execution of the illegal conspiracy to deprive the plaintiff Karen Silkwood and other workers at the Cimarron facility of the equal protection of the law and to conceal this wrongdoing from those entitled to legal damages for this wrongdoing by acts other than those in the normal course of his corporate duties.

Defendant #21 – G. France

27. G. France, residing at 3502 North Maxwell Drive, Oklahoma City, Okla., was, during 1974 and 1975, the License and Safety Officer of Kerr-McGee Corporation's Cimarron nuclear power subsidiary. He is sued herein, however, solely in his personal capacity – as an active member in the devising and execution of the illegal conspiracy to deprive the plaintiff Karen Silkwood and other

workers at the Cimarron facility of the equal protection of the law and to conceal this wrongdoing from those entitled to legal damages for this wrongdoing by acts other than those in the normal course of his corporate duties.

Defendant #22 – James Reading

28. James Reading, residing at P.O. Box 25861, c/o Kerr-McGee Corp., Kerr-McGee Center, 123 Robert S. Kerr Ave., Oklahoma City, Okla. was, during 1974 and 1975, the Director of Security at Kerr-McGee Corporation's Cimarron nuclear power subisidary. He is sued herein, however, solely in his personal capacity – as an active member in the devising and execution of the illegal conspiracy to deprive the plaintiff Karen Silkwood and other workers at this Cimarron facility of the equal protection of the law and to conceal this wrongdoing from those entitled to legal damages for this wrongdoing by acts other than those in the normal course of his corporate duties.

Defendant #23 – Fred Welch

29. Fred Welch, residing at P.O. Box 25861, c/o Kerr-McGee Corp., Kerr-McGee Center, 123 R.S. Kerr Ave., Oklahoma City, Okla. was, during 1974 and 1975, the Assistant Director of Security at Kerr-McGee Corporation's Cimarron nuclear power subsidiary. He is sued herein, however, solely in his personal capacity – as an active member in the devising and execution of the illegal conspiracy to deprive the plaintiff Karen Silkwood and other workers at the Cimarron facility of the equal protection of the law and to conceal this wrongdoing from those entitled to legal damages for this wrongdoing by acts other than those in the normal course of his corporate duties.

Defendant #24 – Weldon C. Gentry

30. Weldon C. "Spot" Gentry, residing at 330 Northeast 60th Street, Oklahoma City, Oklahoma, was during 1974 and 1975, a "Special Security Consultant" for Kerr-McGee Corporation's Cimarron nuclear power subsidiary. He sued herein, however, solely in his personal capacity – as an active member in the devising and execution of the illegal conspiracy to deprive the plaintiff Karen Silkwood and other workers at the Cimarron facility of the equal protection of the law and to conceal this wrongdoing from those entitled to legal damages for this wrongdoing by acts other than those in the normal course of his corporate duties.

Defendant #25 – Lawrence Olson

31. Lawrence Olson, residing at 1332 Southwest 74th Street, Apartment 21, Oklahoma City, Oklahoma, was during 1974 and 1975, the special field agent of the Federal Bureau of Investigation assigned to enforce all federal laws violated in conjunction with the operation of Kerr-McGee Corporation's Cimarron nuclear power subsidiary and the field agent assigned to investigate the radioactive contamination and death of the plaintiff Karen Silkwood. He is sued herein, in his personal as well as his official capacity – as an active participant of the illegal activities of the defendants named herein from those who had a right to legal damages for these wrongdoings by acts other than those in the normal course of his Fed. Bur. of Investigation duties.

Defendant #26 – Theodore Rosack

32. Theodore Rosack, residing at c/o The Federal Bureau of Investigation, The Federal Bldg., 1961 Stout St., Denver, Colorado, was during 1974 and part of 1975,

the Special Agent-In-Charge of the Oklahoma City, Oklahoma, office of the Federal Bureau of Investigation assigned the legal responsibility for enforcing all federal laws violated in conjunction with the operation of Kerr-McGee's Corporation's Cimarron nuclear power subsidiary, and the field office in charge of investigating the radioactive contamination and death of the plaintiff Karen Silkwood. He is sued herein, in his personal and in his official capacity – as an active member of the illegal conspiracy to conceal the illegal activities of the defendants named herein from those who had a right to legal damages for these wrongdoings by acts other than those in the normal course of his F.B.I. duties.

Defendant #27 – Jacque Srouji

33. Jacque Srouji, residing at 5025 Hillsboro Road, Apartment 4A, Nashville, Tennessee 37215, was, during 1975, an official informant of the Federal Bureau of Investigation and an assistant to F.B.I. field agent Lawrence Olson working on the investigation into the radioactive contamination and death of the plaintiff Karen Silkwood. She is sued herein, however, solely in her private and personal capacity – as an active member of the illegal conspiracy to conceal the illegal activities of the defendants named herein from those who had a right to legal damages for these wrongdoings by act other than those in the normal cours of her F.B.I. duties.

Defendant #28 – One Named but Unidentified Agent of the Federal Bureau of Investigation

34. One named, but presently unidentified, agent of the Federal Bureau of Investigation, officed in Washington, D.C. during 1974 and 1975, whose residence is presently unknown, is named as a defendant in this cause of action.

This defendant was the Agent in the Washington office of the F.B.I. who, knowing full well of the illegal activities of the defendants named above, actively joined the conspiracy to conceal the acts of illegality of the other defendants for the express purpose of depriving the plaintiff Karen Silkwood of the equal protection of the laws under which she was entitled to legal damages for the wrongdoing of the defendants by acts other than those in the normal course of his Federal Bureau of Investigation duties.

Cause of Action #1

35. That on or about November 15, 1971, the defendants, Dean A. McGee; James J. Kelly; Peter Colefax; Earl M. Jorgensen; Edwin L. Kennedy; Breene M. Kerr; Robert S. Kerr, Jr.; F.C. Love; George B. Parks; J.B. Saunders; A.P.F. Seale; James E. Webb; R.T. Zitting; Parker S. Dunn; Wayne Norwood; Ronald Adkisson; Roy E. King; G.J. Sinke; J. Marler; G. French; James Reading; Fred Welch and W.C. Gentry entered into a knowingly illegal conspiracy the purpose of which was to prevent the plaintiff Karen G. Silkwood and other persons employed at Kerr-McGee Corporation's Cimarron, Oklahoma nuclear power facility who were endeavoring to organize a lawful labor union to improve their working standards, through force, violence, intimidation, surveillance, harassment, wiretapping and other forms of illegal conduct from seeking the equal protection of the laws and from enjoying the equal rights, privileges and immunities of citizens under the laws of the United States and the State of Oklahoma, including, but not limited to, their rights to freedom of speech, freedom of association, freedom of the press, freedom of movement and travel, freedom of assembly, their right to petition their government for the redress of their grievances; their right to be

secure in their persons, homes and effects and their right not to be deprived of their lives or liberty other than by the due process of law;

36. And, that from this date of November 15, 1972, up until the time of the filing of this lawsuit, all of the above named defendants actively and knowingly participated in a further part of this same conspiracy to conceal all of the illegal action undertaken pursuant to this conspiracy – with defendants Lawrence Olson, Theodore Rosack, the named but unidentified agent of the Federal Bureau of Investigation joining this conspiracy in November of 1974 and defendant Jacque Srouji joining this conspiracy in April of 1975.

37a. The defendants – with the exception of defendants Olson, Rosack, the named but unidentified agent of the Federal Bureau of Investigation, and Srouji – did willfully and knowingly finance, direct and supervise the formulation and execution of a plan in accordance with which the plaintiff Karen G. Silkwood and other workers employed at Kerr-McGee Corporation's Cimarron facility who were active in efforts to organize a lawful labor union were placed under illegal surveillance, so as to compile illegal dossiers on these people for the express and intended purpose of depriving these citizens of equal protection of the laws of the United States and the laws of the State of Oklahoma entitling them freely to associate with one another for legal purposes, and to remain free from illegal invasions of their right to privacy, rights expressly guaranteed to them by the First and Fourth Amendments to the United States Constitution;

37b. The defendants – with the exception of defendants Olson, Rosack, the named but unidentified agent of the Federal Bureau of Investigation and defendant Srouji – did wilfully and knowingly finance, direct and supervise the formulation and execution of a plan in accordance with which persons at their direction surreptitiously entered the homes, lockers and other places with respect to which Karen Silkwood and other workers at the Kerr-McGee Cimarron facility who were actively involved in organizing a lawful labor union had a reasonable expectation of privacy and there placed illegal listening devices in these private places and illegal wiretaps on the telephones being used by Karen Silkwood and these other persons working at the Cimarron facility who were actively involved in organizing a lawful labor union for the express purpose of depriving these citizens of the equal protection of the laws of the United States and the laws of the State of Oklahoma entitling them freely to associate with one another for legal purposes, and entitling them to the right of privacy, rights expressly guaranteed to them by the First and Fourth Amendments to the United States Constitution;

37c. The defendants – with the exception of defendants Olson, Rosack, the named but unidentified agent of the Federal Bureau of Investigation and defendant Srouji – did hire and direct the illegal activities of an unknown number of "operations agents" to the end that said operations agents would do and, indeed, did in fact:

1. Place under illegal surveillance the plaintiff Karen Silkwood and other citizens employed at the Kerr-McGee Corporation's Cimarron facility who were actively engaged in organizing a lawful labor union to improve working conditions at that facility;

2. Illegally enter the private domains under the supervision of plaintiff Karen Silkwood and other citizens employed at Kerr-McGee Corporation's Cimarron facility who were engaged in organizing a lawful labor union including – but not limited to – their private domiciles; their automobiles; their lockers; their desks; and other private areas to which they had a legally-protected expectancy of privacy; and

3. Illegally harass, by various methods – including harassment of the freedom of movement and travel, so as physically to endanger their safety and lives upon the public highways – plaintiff Karen Silkwood and other workers employed at the Kerr-McGee Corporation's Cimarron facility who were engaged in organizing a lawful labor union.

These actions were all undertaken by the defendants for the express and intended purpose of preventing the plaintiff Karen Silkwood and other persons actively engaged in organizing a lawful labor union at the Kerr-McGee Corporation's Cimarron facility from enjoying the equal protection of the laws of the United States entitling them to freely associate and organize for lawful purposes.

37d. The defendants – with the exception of defendants Olson, Rosack, the named but unidentified agent of the Federal Bureau of Investigation and defendant Srouji – did fire and transfer persons at the Kerr-McGee Cimarron facility as express punishment for their having exercised their right to freedom of association and speech as an act explicitly intended to prevent plaintiff Silkwood and other persons actively engaged in organizing a labor union from enjoying the equal protection of the laws;

37e. The defendants – with the exception of defendants Olson, Rosack, the named but unidentified agent of the Federal Bureau of Investigation and defendant Srouji – did endeavor to interfere with the right of plaintiff Karen Silkwood and other citizens working at Kerr-McGee's Cimarron facility from communicating with the public news media by actions including – but not limited to – ordering them not to speak with representatives of the media, under the threat of firing; subjecting them to lie detector tests during which they were asked if they had ever spoken with representatives of the news media; and ordering them to abide by corporation-issued rules forbidding their speaking with representatives of the news media.

This was all done for the express purpose of intimidating and preventing plaintiff Karen Silkwood and other workers employed at the Kerr-McGee Corporation's Cimarron facility from seeking and enjoying the equal protection of the laws of the United States and the State of Oklahoma which entitled them freely to associate

with one another for legal purposes, and to speak to the news media, rights guaranteed to them by the First Amendment to the United States Constitution.

38. The defendants – including defendants Lawrence Olson, Theordore Rosack, the named but unidentified agent of the Federal Bureau of Investigation and defendant Jacque Srouji – with explicit knowledge of the illegal acts which had, in fact, been undertaken by the above-named defendants so as to have deprived plaintiff Karen G. Silkwood and other persons employed at Kerr-McGee Corporation's Cimarron facility who were engaged in organizing a lawful union, of the equal protection of the laws, knowingly and willfully joined and actively participated in the ongoing conspiracy to stop knowledge of these previously-described illegal acts from becoming known to any persons other than themselves – with the express intention to deprive the plaintiff Karen Silkwood and other persons employed at the Kerr-McGee Corporation's Cimarron facility who were engaged in organizing a labor union of the equal protection and enjoyment of the laws of the United States.

39. Pursuant to this illegal conspiracy, and to obtain the illegal objectives of this conspiracy all of the individually named defendants falsified official reports, gave false information to federal officials involved in investigating the illegal acts of the defendants – including, but not limited to, officials from the Atomic Energy Commission, the Federal Bureau of Investigation and the United States Congress.

40. As a direct and proximate result of these illegal actions by the defendants, the plaintiff Karen Silkwood and other citizens employed at the Kerr-McGee Corporation's Cimarron facility were, in fact, damaged, and they were

deprived of the equal protection of the laws and deprived of enjoying the privileges and immunities of citizens of the United States including their rights to freedom of speech; freedom of association; freedom of assembly; freedom of movement and travel, their free access to the press; their right to privacy; their right to petition their government for a redress of their grievances and their right not to be deprived of their life, liberty or property other than by the due process of law.

Cause of Action #2

41. That on or about October 1, 1974, the defendants Dean A. McGee; James J. Kelly; Peter Colefax; Earl M. Jorgensen; Edwin L. Kennedy; Breene M. Kerr; Robert S. Jerr, Jr.; F.C. Love; George B. Parks; J.B. Saunders; A.P.F. Seale; James E. Webb; R.T. Zitting; Parker S. Dunn; Wayne Norwood; Ronald Adkisson; Roy E. King; G.J. Sinke; J. Marler; G. French; James Reading; Fred Welch and W.C. Gentry entered into a knowingly illegal conspiracy the purpose of which was to prevent the plaintiff Karen G. Silkwood and other persons employed at Kerr-McGee Corporation's Cimarron facility who had filed complaints against the Corporation under the Atomic Energy Act through force, violence, intimidation, surveillance, harassment, wiretapping and other forms of illegal conduct from seeking the equal protection of the laws and from enjoying the equal rights, privileges and immunities of citizens under the laws of the United States and the State of Oklahoma, including, but not limited to, their rights of freedom of speech, freedom of association, freedom of the press, freedom of movement and travel, freedom of assembly; their right to petition their government for the redress of their grievances; their right to be secure in their persons, homes and effects and their right not to be deprived of their lives or liberty other than by the due process of law;

42. And, that from this date of October 1, 1974, up until the time of the filing of this lawsuit, all of the above-named defendants actively and knowingly participated in a further part of this same conspiracy to conceal all of the illegal actions undertaken pursuant to his conspiracy – with defendants Lawrence Olson, Theordore Rosack, the named but unidentified agent of the Federal Bureau of Investigation joining this conspiracy in November of 1974 and defendant Jacque Srouji joining this conspiracy in April of 1975.

43. Each of the following overt acts were undertaken by the defendants to achieve the illegal objectives of this conspiracy.

> 43a. The defendants – with the exception of defendants Olson, Rosack, the named but unidentified agent of the Federal Bureau of Investigation, and Srouji – did willfully and knowingly finance, direct and supervise the formulation and execution of a plan in accordance with which the plaintiff Karen G. Silkwood and other workers employed at Kerr-McGee Corporation's Cimarron facility who were active in efforts to organize a lawful labor union were placed under illegal surveillance, so as to compile illegal dossiers on these people for the express and intended purpose of depriving these citizens of the equal protection of the laws of the United States and the laws of the State of Oklahoma entitling them freely to associate with one another for legal purposes, and to remain free from illegal invasions of their right to privacy, rights expressly guaranteed to them by the First and Fourth Amendments to the United States Constitution;

43b. The defendants – with the exception of defendants Olson, Rosack, the named but unidentified agent of the Federal Bureau of Investigation and defendant Srouji – did willfully and knowingly finance, direct and supervise the formulation and execution of a plan in accordance with which persons at their direction surreptitiously entered the homes, lockers and other places with respect to which Karen Silkwood and other workers at the Kerr-McGee Cimarron facility who had filed complaints against the Corporation under the Atomic Energy Act had a reasonable expectation of privacy and there placed illegal listening devices in these private places and illegal wiretaps on the telephones being used by Karen Silkwood and these other persons working at the Cimarron facility who had filed complaints against the Corporation under the Atomic Energy Act for the express purpose of depriving these citizens of the equal protection of the laws of the United States and the laws of the State of Oklahoma entitling them freely to associate with one another for legal purposes, and entitling them to associate with one another for legal purposes, and entitling them to the right of privacy, rights expressly guaranteed to them by the First and Fourth Amendments to the United States Constitution;

43c. The defendants – with the exception of defendants Olson, Rosack, named but unidentified agent fo the Federal Bureau of Investigation and defendant Srouji – did hire and direct the illegal activities of an unknown number of "operations agents" to the end that said oeprations would do and, indeed, did in fact:

1. Place under illegal surveillance the plaintiff Karen Silkwood and other citizens employed at the Kerr-McGee Corporation's Cimarron facility who had filed complaints against the Corporation under the Atomic Energy Act;

2. Illegally enter the private domains under the supervision of plaintiff Karen Silkwood and other citizens employed at Kerr-McGee Corporation's Cimarron facility who had filed complaints against the Corporation under the Atomic Energy Act including – but not limited to – their private domiciles; their automobiles; their lockers; their desks; and other private areas to which they had a legally-protected expectancy of privacy; and

3. Illegally harass, by various methods – including harassment of the freedom of movement and travel, so as physically to endanger their safety and lives upon the public highways – plaintiff Karen Silkwood and other workers employed at the Kerr-McGee Corporation's Cimarron facility who had filed complaints against the Corporation under the Atomic Energy Act.

These actions were all undertaken by the defendants for the express and intended purpose of preventing the plaintiff Karen Silkwood and other persons at Kerr-McGee Corporation's Cimarron facility who had filed complaints against the Corporation under the Atomic Energy Act from seeking and enjoying the equal protection of the laws of the United States and the State of Oklahoma which entitled them freely to associate with one anther for lawful purposes.

43d. The defendants – with the exception of defendants Olson, Rosack, the named but unidentified agent of the Federal Bureau of Investigation and defendant Srouji – did fire and transfer persons at the Kerr-McGee Cimarron facility as express punishment for their having exercised their rights to freedom of association and speech as an act explicitly intended to prevent plaintiff Silkwood and other persons at Kerr-McGee Corporation's Cimarron facility who had filed complaints against the Corporation under the Atomic Energy Act from communicating with the public news media by actions including – but not limited to – ordering them not to speak with representatives of the media, under threat of firing; subjecting them to lie detector tests during which they were asked if they had ever spoken with representatives of the news media; and ordering them to abide by corporation-issued rules forbidding their speaking with representatives of the news media.

This was all done for the express purpose of intimidating and preventing plaintiff Karen Silkwood and other workers employed at the Kerr-McGee Corporation's Cimarron facility who had filed complaints against the Corporation under the Atomic Energy Act from seeking and enjoying the equal protection of the laws of the United States and the State of Oklahoma which entitled them freely to associate with one another for legal purposes, and to speak to the news media, rights guaranteed to them by the First Amendment to the United States Constitution.

44. The defendants – including defendants Lawrence Olson, Theodore Rosack, the named but unidentified agent fo the Federal Bureau of Investigation and defendant Jacque Srouji – with explicit knowledge of the illegal acts which had, in fact, been undertaken by the above-named defendants so as to have deprived plaintiff Karen G. Silkwood and other persons employed at Kerr-McGee Corporation's Cimarron facility who had filed complaints against the Corporation under the Atomic Energy Act of the equal protection of the laws, knowingly and willfully joined and actively participated in the ongoing conspiracy to stop knowledge of these previously-described illegal acts from becoming known to any persons other than themselves – with the express intention to deprive the plaintiff Karen Silkwood and other persons employed at the Kerr-McGee Corporation's Cimarron facility who had filed complaints against the Corporation under the Atomic Energy Act from the equal protection and enjoyment of the laws of the United States.

45. Pursuant to this illegal conspiracy, and to obtain the illegal objectives of this conspiracy all of the individually-named defendants falsified official reports, gave false information to federal officials involved in investigating the illegal acts of the defendants – including, but not limited to, officials from the Atomic Energy Commission, the Federal Bureau of Investigation and the United States Congress.

46. As a direct and proximate result of these illegal actions by the defendants, the plaintiff Karen Silkwood and other citizens employed at the Kerr-McGee Corporation's Cimarron facility who had filed complaints against the Corporation under the Atomic Energy Act were, in fact, damaged and they were deprived of the equal protection of the laws and deprived from enjoying the privileges and

immunities of citizens of the United States including their rights to freedom of speech; freedom of association; freedom of assembly; freedom of movement and travel; their free access to the press; their right to privacy; their right to petition their government for a redress of their grievances and their right not to be deprived of their life, liberty or property other than by the due process of law.

Cause of Action #3

47. That on or about November 5, 1974, special nuclear materials given over into the possession of the Kerr-McGee Corporation were removed from the Corporation's Cimarron facility and contaminated the plaintiff Karen G. Silkwood in her private dwelling place, inflicting upon her serious bodily injury as a direct and proximate result of the willful and wanton negligence the defendant Kerr-McGee Corporation in not only failing – But, indeed, in willfully refusing – to establish and maintain worker safety and public safety regulations at its Cimarron facility which would have been maintained by reasonable persons invested with the responsibility for these extraordinarily toxic and dangerous nuclear materials – conduct on the part of the defendant Corporation which was part of the poor working conditions being protested at the Cimarron facility.

48. As a direct and proximate result of willful and wanton negligence of the Kerr-McGee Corporation, the plaintiff Karen Silkwood was subjected directly to the impact of toxis plutonium radiation emissions the special nuclear materials lin the exclusive legal possesion of the defendant Kerr-McGee Corporation. And, as direct and proximate result of this impact, plaintiff Karen Silkwood experienced physical illness and resultant serious mental anguish and suffering, as well as loss of property – which property was taken from her possesion and retained by the Kerr-

McGee Corporation with no reimbursement to the plaintiff Karen Silkwood.

The Relief Requested

49. WHEREFORE: the plaintiff Karen G. Silkwood, through the Administrator of her estate and the three infant heirs of the plaintiff, through their natural father and guardian, demand the following relief:

49a. That this Court order that the estate and heirs of Karen G. Silkwood be reimbursed by the Kerr-McGee Corporation in the sum of $5,000 for the personal property rendered radioactive through the negligence of the Kerr-McGee Corporation and subsequently taken by its agents without its reimbursement;

49b. That this Court order that the estate and heirs of Karen G. Silkwood be awarded the sum of $10,000 from the Kerr-McGee Corporation for the physical injury to which she was subjected as a direct and proximate result of the willful and wanton negligence of the Kerr-McGee Corporation;

49c. That this Court order that the estate and heirs of Karen G. Silkwood be awarded the sum of $10,000 from the Kerr-McGee Corporation for the mental anguish and mental suffering inflicted upon the plaintiff Karen Silkwood as a result of the physical exposure she suffered to the damaging dosage of special nuclear materials in her home which was the direct and proximate result of the willful and wanton negligence of the Kerr-McGee Corporation;

49d. That this Court order that the estate and heirs of Karen G. Silkwood be awarded the sum of $10,000 from the individually-named defendants who engaged in the described illegal conspiracy to deprive plaintiff Karen Silkwood and other citizens employed at the Kerr-McGee Corporation's Cimarron facility who were engaged in organizing a lawful union to protest dangerous and poor working conditions at this facility of the equal protection of the laws of the United States and the privileges and immunities guaranteed to them by statute and by the First, Fourth, Fifth and Ninth Amendments to the United States Constitution, so as to prevent them from enjoying of their equal right freely to associate with one another for entirely legal purposes;

49e. That this Court order that the estate and heirs of Karen Silkwood be awarded $10,000 by the named defendants, with the exception of defendants – Olson, Rosack, the named but unidentified agent of the Federal Bureau of Investigation and defendant Srouji, who willfully directed against her and the other citizens employed at the Kerr-McGee Corporation's Cimarron facility the independently illegal overt acts which resulted in the violation of the right of Karen Silkwood and her co-workers freely to communicate with members of the public press;

49f. That this Court order that the estate and heirs of Karen Silkwood be awarded the sum of $10,000 by the named defendants – with the exception of defendants Olson, Rosack the named but unidentified agent of the Federal Bureau of

Investigation, and defendant Srouji – who willfully directed against her and the other citizens employed at the Kerr-McGee Corporation's Cimarron facility who were engaged in organizing a lawful union, the independently illegal acts which resulted in the violation of the right of Karen Silkwood and her co-workers to privay and to be secure in their persons, homes and effects;

49g. That this Court order that the estate and heirs of Karen Silkwood be awarded $10,000 by the named defendants, with the exception of defendants Olson, Rosack, the Named but unidentified agent of the Federal Bureau of Investigation and defendant Srouji, who willfully directed against her and the other citizens employed at the Kerr-McGee Corporation's Cimarron facility who had reported violations of the Atomic Energy Act to government authorities the independently illegal overt acts which resulted in the violation of the right of Karen Silkwood and her co-workers who had reported violations of the Atomic Energy Act to government authorities the right to petition their government for the redress of grievances.

49h. That this Court order that the estate and heirs of Karen Silkwood be awarded the sum of $10,000 by all of the named defendants – including defendants Lawrence Olson, Theodore Rosack, the named but unidentified agent of the Federal Bureau of Investigation and defendant Jacque Srouji – who willfully joined into and actively participate din the illegal conspiracy to deprive Karen Silkwood of the equal protection of the laws of the United States by willfully con-

cealing information and facts on the basis of which she was entitled to legal relief under the laws of the United States; and which deprived them of the equal enjoyment of the other privileges and immunities enumerated above;

49i. That this Court order that the estate and heirs of Karen Silkwood be awarded the sum of $10,000 by the named defendants – with the exception of defendants Olson, Rosack and Srouji – who willfully directed against Karen Silkwood and other citizens employed at the Kerr-McGee Corporation's Cimarron facility who were engaged in organizing a union the independently illegal acts which resulted in the violation of the right of Karen Silkwood and her co-workers freely to travel on the public highways;

49j. That this Court order that the estate and heirs of Karen Silkwood be awarded the sum of $75,000 in punitive damages against all of the defendants named in this action on the basis of proof that the actions of the defendant corporation were entirely willful and wanton and that the actions undertaken by the individually-named defendants were entirely willful and intentional violations of the federal laws protecting the plaintiff Karen Silkwood and her co-workers against the exact acts willfully and intentionally undertaken by the named defendants, to the injury of Karen Silkwood;

49k. That this Court grant any and all other legal and equitable relief to which it finds the estate and heirs of Karen Silkwood to be entitled.

The plaintiffs herein request a jury trial on this cause of action and request that a Special Finding of Fact be made by the jury.

Dated: Oklahoma City, Oklahoma
November 5, 1976

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APPENDIX F
THE PETITIONERS' 1978 RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, AND EXAMPLES OF EXHIBITS

APPENDIX F

THE PETITIONERS' 1978 RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENTS AND EXAMPLES OF EXHIBITS

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

KAREN G. SILKWOOD, by the Administrator of her estate, William M. Silkwood; and Beverly K. Meadows; Michael E. Meadows; and Dawn E. Meadows; the infant heirs of Karen G. Silkwood by their Guardian, William E. Meadows,	)	No. CIV—76-0888-Thole
Plaintiffs,	)	
vs.	)	
THE KERR-McGEE CORPORATION, et al.,	)	
Defendants.	)	

RESPONSE TO THE DEFENDANTS' MOTION DEMANDING THE SUMMARY DISMISSAL OF THE PLAINTIFFS' COMPLAINT ON THE GROUND THAT THE PLAINTIFFS POSSESS NO EVIDENCE WHICH, IF BELIEVED BY A JURY, WOULD SUPPORT A REASONABLE CONCLUSION THAT THE DEFENDANTS HAD ENGAGED IN A CONSPIRACY TO VIOLATE THE CIVIL RIGHTS OF KAREN SILKWOOD AND OF MEMBERS OF HER CLASS

Introductory Statement

In January of 1978, the individual Kerr-McGee Defendants, the F.B.I. Defendants and Defendant Jacque Srouji filed a collective Motion demanding the Summary Dismissal of the Plaintiffs' Civil Rights Act Complaint. Two, separate, grounds were set forth by the Defendants on which this demand was predicated. First, the Defendants asserted that the present state of *the law* did not provide any legal relief to the Plaintiffs – even if every fact alleged in the Plaintiffs' Complaints was found by a jury to be entirely true. Second, the Defendants contended that the Plaintiffs were in possession of no evidence which supported their charge that the Defendants had engaged in a conspirary to violate the civil rights of Karen Silkwood and of members of any class to which she belonged.

On February 16, 1978, this Court held a Status Hearing on this case, at which the Court recommend that the Defendants voluntarily hand over to the Plaintiffs evidence and documents which had been properly subpoenaed by the Plaintiffs during 1977, but which had theretofore been withheld by the Defendants on various grounds – which the Court indicated were legally insufficient.

At this February Hearing, the Court asked the Plaintiffs to file their response to the Defendants' *legal* contentions made in support of their January 1978 Motion for Summary Dismissal – so as to clarify the purely legal issues underlying the Defendants' Motion for Summary Dismissal.

Inquiries were made by the Plaintiffs at this Hearing as to whether or not it might be advisable to temporarily post-pone the Plaintiffs Response to the Defendants' allegations as to the lack of any *factual* evidence in the

hands of the Plaintiffs to support their Civil Rights Act Complaint until *after* the Defendants and various government agencies had given over to the Plaintiffs the documentary evidence and the answers to questions improperly withheld from the Plaintiffs during 1977. The Plaintiffs tought that this had been found to be advisable by the Court.

On March 7, 1978, the Court clarified that the Court wanted the Plaintiffs to file a "response to the factual issues germane to the subject motion" (for summary dismissal) prior to the completion of discovery – "giving their factual contentions the broadest possible construction". The instant Response is filed pursuant to this request by the Court.

This Response is also intended to assist the Court by setting forth, in a single document, the present theory of the Plaintiffs' overall case – pointing out and tendering to the Court the evidence which the Plaintiffs already possess; describing the evidence which the Plaintiffs believe is still in the hands of the various Defendants; describing the evidence which is still in the hands of various government agencies; and explaining the potential relevance of evidence the Plaintiffs seek from the persons presently under subpoena to appear and to produce evidence at the April 10th Hearings scheduled by this Court. Attached to this Response, as Exhibits, are various pieces of evidence presently in the hands of the Plaintiffs. Footnoted references are also set forth herein referencing other documents which are known to be in the hands of various government agencies, but which said agencies have refused voluntarily to give over to the Plaintiffs as of this date. Other facts are set forth in this Response without direct evidence in support of them being presently available for submission to the Court. These facts are, however, set

forth for the Court to assist the Court in determining the potential relevance of evidence sought during the upcoming April 10th hearings.

The Facts

In the early 1960's, Senator Robert S. Kerr held the seat of the Senior United States Senator from the State of Oklahoma. He also owned and operated, with his business partner, Dean A. McGee, the most powerful single business enterprise in the State of Oklahoma. This business enterprise was the Kerr-McGee Corporation, a huge energy conglomerate built up over the years since Robert Kerr's ascendency to the Governor's Mansion in Oklahoma on profits made on oil, gas, helium – and, beginning in the 1950's on uranium and nuclear fuels. While Robert S. Kerr held the Oklahoma Senior Senate seat, millions of dollars in U.S. government contracts were awarded to his privately-owned Oklahoma corporation, bringing Senator Kerr to the status of a multi-millionaire by the time he passed from the scene in 1963.

Throughout the 1960's, on the basis of information obtained by Senator Kerr during the performance of his duties as a United States Senator, the Kerr-McGee Corporation made business investments in the development of uranium and nuclear fuels which brought it to a position as one of the unchallenged giants in the private nuclear industry at the time of Senator Kerr's demise.

Still benefiting from knowledge gained from Senator Kerr's political contacts in Washington, the Board of Directors of the Kerr-McGee Corporation voted, in 1970, to build a nuclear re-processing plant in Cimarron, Oklahoma designated to recover pure plutonium fuel from the plutonium-nitrate waste materials produced by nuclear-powered electric generators as they generated elec-

tricity from uranium-enriched nuclear fuel. This facility was also designated to transform the newly-recovered plutonium into plutonium "pellets", to be placed into eight-foot-long, pencil-thin, stainless steel fuel rods. These rods were, in turn, to be the plutonium fuel rods which would power the American-planned plutonium-fueled fast-flux "breeder" reactor, the long-dreampt-of atomic generator which would create *more* plutonium as a by-product of its energy-generating process than it actually used to generate power. Holding this key production facility within its corporate empire would give the Kerr-McGee Corporation's Nuclear Division a firm grip on a central re-processing step which lay at the heart of America's future energy production plans.

However, the use of plutonium as the fuel ingredient in this new power-generating system created severe new problems for those private companies which would come to possess this material. For plutonium was the heavier-than-gold metal which, in small quantities. could easily be used to produce an atomic bomb, which could anihilate an entire American city. Moreover, a tiny speck of this material, even too small to see, would cause irreversible lung cancer in human beings, if one were improperly exposed to its deadly radiation. In short, while holding the promise of Western Culture's long-held dream of a perpetual motion machine to drive American industry, this substance was, at the same time, the most deadly single substance ever discovered by man. It held our dreams. But it also portended our doom. To manage it; to safeguard it; to store it; to use it, without killing all of those who came into contact with it; this was the task facing those who would use the substance to make their private fortune.

To prepare to meet this challenge, the Kerr-McGee Board of Directors, however, had not one single discus-

sion directed toward acquainting its members with the deadly characteristics of this dangerous substance.[1] They discussed only how many technological hurdles would have to be surmounted before members of the Board of Directors and the few large stockholders in the Kerr-McGee Corporation would be able to start realizing the huge personal profits the use of this new fuel promised.[2]

Construction of the facility began here in the heart of America, the home of the perennial contenders for the American National College Football Championship: the home of the Oklahoma began to raise themselves. Pipes leaked; joints didn't fit; materials selected to make containers to house the plutonium were discovered to be completely soluable when exposed to plutonium. However, many of these critical problems were brushed aside, in the rush to be ready to accept the first government contract. (See Deposition of James W. Smith, p. to .)

Then there was the problem of finding qualified personnel. Where did one find first-rate nuclear safety personnel out in the middle of the American prairie? Six-foot-five-inch linebrackers, who could run the hundred yard dash in 12 seconds flat were recruited from all over the nation — to work for the "Sooners"; but the most highly qualified nuclear personnel could not be found. So, second-rate help was taken, third-rate and fourth-rate help were soon to follow. Finally, totally un-qualified help would be found to be acceptable — anything to cut production cots and to maintain an acceptable rate of profit — for those who owned the company.

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[1]See Defendant Dean McGee's Deposition, pp. 20 to 22.

[2]Id.

Production began in 1972. At first things went well enough. The facility was new; the equipment had just begun to be exposed to this new substance plutonium. And then it began to work its curious ways. Pipes leaked; sockets rotted; entire hollow walls were filled with overflows of the deadly flowing metal. But production was not stopped. . . it was almost never stopped – for that cost money. "Moonsuits", head-to-foot, instead, were found. And people put in them; then were sent in to clean the walls; to clean the floors; to clean the "everything". For everything was getting exposed. But they wouldn't stop production to solve these problems. Production must roll on.[3]

Managers protested. . . Refused to work and wouldn't send the workers in to work . . . in "Moonsuits". "The suits are only for cleaning", they protested. "They are only for emergencies". "They are for *working* in, too – if need be," they were told by management – "or else Get Out!" And so they worked. . . in Moonsuits. And production rolled on.[4]

And then the union came. . . and trouble. They wouldn't work. They struck. and trouble started.

During the Summer of 1972, the Oil, Chemical and Atomic Workers Union began to organize among the workers employed at the Kerr-McGee Corporation's Cimarron Nuclear Facility. Union organizers stressed the extreme health and safety dangers inhereint in working with this new, and deadly, radioactive susbstance. They encouraged the workers to aggitate for increased health and safety standards at the facility. Finally, O.C.A.W.

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[3]See Deposition of Plant Manager James V. Smith. Exhibit #2.

[4]See Deposition of Plant Manager James V. Smith. Supra.

representatives were chosen in an open election by the workers in the November, 1972 company-employee contract negotiations during which the Kerr-McGee workers demanded increased health and safety protection at the Cimarron Facility as a pre-condition for their willingness to continue to work at the plant.

The Kerr-McGee Corporation refused. The workers walked out. And the Kerr-McGee-O.C.A.W. conflict at the Cimarron Facility began.[5]

The Company was determined to break the O.C.A.W. Company negotiators stood fast in the face of the Union walkout. It hired untrained, non-union workers to take the place of union employees out on strike. The Company refused to offer the Cimarron Facility workers even the contract terms which they had worked under prior to selecting the O.C.A.W. as their bargaining agent – as a means of demonstrating to the workers the disservice they were doing themselves by choosing the O.C.A.W. representatives as their bargaining agents.

This posture was maintained by the Kerr-McGee Corporation until February of 1973, at which time the Cimarron Facility workers were compelled to return to work under the watered-down contract which provided even weaker safeguards and health protections than did the 1970-1972 contract. It was ony upon the signing of this weakened contract that the Kerr-McGee Corporation rehired personnel who were trained to staff the Cimarron Facility. Beginning in November of 1972, the Kerr-McGee Corporation embarked upon a campaign to have the

[5]See the Congressional testimony of Anthony Mozzachi, Vice President of the Oil, Chemical and Atomic Workers Union, April 26, 1976 (attached hereto as Exhibit #3).

O.C.A.W. "de-certified" as the representatives of the workers at the Cimarron Facility.

On or about November 15, 1972, the individual Kerr-McGee Defendants named in the November 5, 1976 Civil Rights Act Complaint, entered into a knowingly illegal agreement to undertake, and to cause to be undertaken by their agents, specific concrete acts against a particular citizens' group, or "class" of citizens, which acts would have violated explicitly guaranteed fundamental human rights guaranteed by the federal government to all American citizens by the Constitution of the United States. The Defendants entered into this agreement because they held an illegal, invidious, discriminatory "animus" toward all of the members of this particular citizens' group, or "class" of citizens, and wanted, therefore, to deprive the members of this class of citizens of the rights which are guaranteed to them as American citizens.

The citizens' group, the members of which these Defendants agreed together to injure in this special manner was, "all of the employees of the Kerr-McGee Corporation's Nuclear Facility located in Cimarron, Oklahoma who were endeavoring to organize a lawful trade union".[6]

The particular concrete acts, among others, which the Defendants agreed together to undertake against members

[6]These same Defendants, at this same time, and for this same reason, also entered into a similar agreement with respect to "all employees of the Kerr-McGee Corporation's Nuclear Facility located in Cimarron, Oklahoma who filed complaints against the Kerr-McGee Corporation reporting that company's violation of provisions of the Atomic Energy Act to the Federal Atomic Energy Commission". However, for purposes of simplicity and clarity in discussing this matter just one of these two citizens groups will be used as the "referent group" for purposes of the Plaintiffs' discussion here.

of this particular citizens' group, or "class" of citizens, were:

1. the wiretapping of their telephones;
2. the planting of electronic eavesdropping equipment in their private homes;
3. the maintenance of full-time physical surveillance against these citizens by specially-trained domestic surveillance experts, both in their places of privacy and on the public highways;
4. the collecting, and maintenance of investigatory "dossiers" on these persons, containing information about their sex life; their financial dealings; their lawful, political and social organizational affiliations ; their recreational use of alcohol or marijuana – and their "attitude" toward the use of nuclear power as a primary means of supplying electrical energy;
5. the illegal entrance into the private domains under the supervision of members of this group;
6. the illegal harrassment of these people, including the interference with their freedom of movement upon the public highways;
7. the threatening of these people with loss of their jobs at the Kerr-McGee Nuclear Facility if they spoke with members of the Press;
8. the invasion into the private workings of the mental processes and into the private information contained in the minds of these people, through the use against them of lie detector equipment;
9. the firing, and transferring to more unsatisfactory work places of these people, and

10. the willful giving of false information to Congressional officials, federal agencies and to Federal courts, to keep members of this citizens' group from securing rights guaranteed to them under the law.

The particular fundamental human rights guaranteed to members of this citizens' group by the United States Constitution of which the Defendants agreed to deprive these citizens through the performance, against them, of these concrete acts were:

1. their First Amendment right to Freedom of Associations;
2. their First Amendment right to Freedom of Speech;
3. their First Amendment right to access to the Free Press;
4. their First Amendment right to Petition the Government for a Redress of Grievances;
5. their First and Fourth Amendment right not to have private organizational information about their political and social activities compiled and filed in illegal intelligence files;
6. their First and Ninth Amendment right to Freedom to Travel on the public highways;
7. their Fourth Amendment right to be secure in their persons, homes and effects against unwarranted searches and seizures;
8. their Fourth and Ninth Amendment right not to have invaded, through the use of lie detector equipment, their private, internal workings of their thought processes and their private, intellectual information;

9. their Fifth Amendment right not to be deprived of personal property without just compensation;

10. their Fifth Amendment right not to be compelled to provide information which could incriminate them;

11. their Fifth Amendment right to due process before being deprived of lawful employment; and

12. their right of federal citizenship to be given the protection of Federal law enforcement officials when they are victims of violations of federal law.

Pursuant to this illegal agreement, the named individual Kerr-McGee Defendants, through their agent James Reading, in August of 1973, retained the services of several "special surveillance operatives as supplemental staff of the Kerr-McGee Corporation's security Division. These persons hired were associates of Arthur Benson, William Lovin, John Taylor, George Davis, Herbert Nichols, Robert Twidell, Daniel Sellers, Melvin Banks, Gregory Jackson, Fred Lindstrom, James Duff and Horace Waters[7] and also of one Jerry DuCote.[8]

Pursuant to this continuing agreement, these surveillance operatives[9] did, in fact, undertake the illegal

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[7]All of whom were then employed by an organization known as "Risk Management" and were then involved in undertaking illegal nuclear plant surveillance – including the wiretapping of workers at the plants, and the use of illegal electronic eavesdropping equipment and other forms of illegal surveillance against workers at the Hatch Nuclear Power Plant in the State of Georgia. See Exhibit #11.

[8]Mr. DuCote was, at that time, engaged in these exact same activities for the Pacific Gas and Electric Company in the State of California, working for an organization by the name of "Research West". Exhibit 11.

[9]These men were William Vetter, Larry Baker, A.J. Clovis, B.J. Brown and Larry Upchurch, along with others. (Oklahoma City police officers).

wiretapping, the illegal electronic eavesdropping and the illegal surveillance and harrassment planned by the Defendants against members of this particular targeted group, or "class", of citizens during 1973 and 1974.[10] Other employees of the Kerr-McGee Nuclear Corporation – acting under direct instructions from the individual named Kerr-McGee Defendants and their agents – did undertake the planned improper use of lie detectors against members of the target "class".[11] And the individually-named Kerr-McGee Defendants did cause to be issued explicit threats to fire any member of the targeted "class" who exercised his or her First Amendment right to communicate with members of the Free Press about the alarming unlawful working conditions which existed at Kerr-McGee's Cimarron Nuclear Facility.[12]

From August of 1973 to August of 1974, the Kerr-McGee Corporation undertook a year-long campaign to remove the O.C.A.W. as the bargaining agent for the workers at the Cimarron Facility.

Investigations conducted by professional investigators retained by the National Labor Relations Board generated an entire file of evidence on the basis of which the National Labor Relations Board investigators concluded that the Defendants named in this lawsuit were engaged during 1973 and 1974 in a civil conspiracy to violate the civil rights of Karen Silkwood and the employees at the Kerr-McGee Corporation's Cimarron Facility who were engaged in an effort to organize workers on behalf of the Oil, Chemical and Atomic Workers Union. This proof is contained in a N.L.R.B. file which is designated as "Kerr-

[10]See Srouji testimony before Congress and Affidavit of Peter Stockton. Exhibit #5 and Exhibit 4.

[11]See Exhibit #6 attached hereto.

[12]See Exhibit #8 attached hereto.

McGee Nuclear Corporation, Cimarron Facility, E 16-Ca-5905" and is kept in the N.L.R.B. 16th Regional Office, Room 8A24 in the Federal Office Building, Ft. Worth, Texas.

Justice Department officials declined to tell the Plaintiffs about this file until after the date of December 1, 1977 – maintaining up until January of 1978 (after the Defendants herein had filed their Motion for Summary Dismissal) that the N.L.R.B. had "come to no conclusion" about the charges of anti-union harrassment, but had simply turned the investigation of these charges over to the F.B.I. "when the N.L.R.B. determined that potential criminal violations of the N.L.R.A. might be involved".

Without the subpoena power necessary to obtain these files, the Plaintiffs have endeavored to obtain these files from the N.L.R.B. on a voluntary basis. But the N.L.R.B. refuses to release these documents without a subpoena.

(The Occupational Safety and Health Administration takes the same position with respect to six folders containing O.S.H.A. complaints filed against the Kerr-McGee Nuclear Facility charging it with flagrant violations of health and safety standards governing the handling of special materials. In fact, the Regional Administrator of O.S.H.A. threatened to cause the firing of any O.S.H.A. employees who released "the Kerr-McGee material" without a court order.)

Thus, N.L.R.B. documents exist which contain professional governmental investigative reports concluding that the Kerr-McGee Corporation was actively engaged in a civil conspiracy against Karen Silkwood and other employees of the Cimarron Facility who, in 1974, were attempting to organize workers at that facility for the O.C.A.W. And comparable governmental investigative

reports exists in the files of O.S.H.A. specifically concluding that the Kerr-McGee Corporation was willfully refusing to follow even the most minimal standard of due care with respect to safeguarding the special nuclear materials put into the company's possession during the 1972-1975 period. But over steps are being taken by these government agencies to keep the Plaintiffs from obtaining these documents, the existence of which were actively concealed from the Plaintiffs by false representations by the Justice Department during 1977. These records, however, constitute a valuable part of the Plaintiffs' evidence in this case. And the Court will be requested to assist the Plaintiffs in securing copies of these documents.

During the period of time referenced in the Plaintiff's Complaint, members of this targeted "class" were actually, in fact, demoted[13] and others were fired[14] pursuant to this agreement simply because they were members of this "class", and illegal "dossiers" were, as planned, prepared and kept on file regarding the private lives and the organizational associations of members of this targeted citizens; group, exactly as was planned by the Defendants.[15]

Finally, all government agency inquiries concerning these illegal acts were intentionally disrupted by the Defendants, by causing agents of this illegal conspiracy willfully to lie to representatives of federal Executive Department agencies and to commit knowing and willful perjury before the United States Congress and before the United

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[13]Mr. Jack Tice (See N.L.R.B. documents referred to in Exhibit .)

[14]Mr. Gerald Brewer (See N.L.R.B. documents referred to in Exhibit 7).

[15]See e.g. Affidavit of Mr. John Taylor attached hereto as Exhibit #11.

States District Court for the Western District of Oklahoma and before the United States District Court for the Western District of Oklahoma and before the United States District Court for the District of Tennessee.[16]

As an integral part of this unlawful agreement, the individually named Kerr-McGee Defendants further agreed to take all necessary steps needed to "cover-up" their unlawful conduct undertaken against members of these citizens' groups – these contemplated acts explicitly included the filing and making of false statements to government agencies inquiring into the wrong-doing of the Defendants; the construction of any necessary "cover stories" that might be needed to explaint-away facts tending to reveal their collective wrong-doings and the corrupting of any federal investigators who were assigned to investigate this wrong-doing.

During the Fall of 1974, the individually-named Kerr-McGee Defendants, through their above-identified "special operations agents", and directly pursuant to the above-detailed agreement, caused the Plaintiff Karen G. Silkwood to be placed under intense, full-time physical surveillance. This physical surveillance entailed the unlawful entrance into her home, Apartment #2, located at 908 North Washington Street in the town of Edmond, Oklahoma; the placing of illegal wiretaps on her telephone by agents of the Kerr-McGee Defendants; the placing of illegal electronic eavesdropping equipment in Ms. Silkwood's home and the harrassing following of Karen G. Silkwood on the public hihgways in and around the towns of Edmond, Crescsent and Oklahoma. This illegal activity continued on into the month of November of 1974, during

[16]See e.g. Srouji statements to F.B.I. attached hereto as Exhibit #10.

which time agents of the Defendants entered Ms. Silkwood's home and unlawfully removed documents from her home. During this time, agents of the Kerr-McGee Corporation also caused radioactive plutonium to contaminate the food in Ms. Silkwood's home refrigerator which, in turn seriously contaminated the Plaintiff, causing her serious physical injury.[17]

During this same period of time, agents of the individually-named Kerr-McGee Defendants undertook to follow the Plaintiff Karen Silkwood on the public highways in such a manner as to harrass her and to place her in physical danger. On the evening of November 13, 1974, at or about 7:30 p.m., Karen G. Silkwood's car was rammed in the rear and driven from the public highway — killing her, when she struck a concrete bridge abutment on Highway 74 near Crescent, Oklahoma.[18]

At or about this same time, agents of the Kerr-McGee Defendants unlawfully entered Karen G. Silkwood's car and, illegally, physically removed therefrom documents belonging to Ms. Silkwood.[19]

Ad indicated above, in 1975 and 1976, Defendant Jacque Srouji repeatedly confided to Congressional investigators and their associates that James Reading had told her that the and his associates had unlawfully wiretapped Karen Silkwood and her union associates and planted illegal electronic surveillance equipment in their homes.[20]

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[17]See G.A.O. findings attached hereto as Exhibit #14.

[18]See Formal Report of the Accident Reconstruction Laboratories attached hereto as Exhibit #15.

[19]See Exhibit #16 attached hereto.

[20]See Affidavits of Congressional Investigator Peter Stockton and Mr. Howard Kohn, attached hereto as Exhibits #4 and 17.

Professional investigations conducted by the Plaintiffs' attorneys have uncovered a nation-wide secret surveillance system which has been engaged in illegal surveillance operations against nuclear facility workers and other American citizens for the past five years. William Lovin was going to explain the workings of this operation and the respective roles played by nuclear corporation security personnel; local police intelligence units; states bureaus of criminal investigations; members of the Law Enforcement Intelligence Unit; the F.B.I.; the Law Enforcement Assistance Administration and the Central Intelligence Agency. He is now unavailable. The Plaintiffs will, therefore, endeavor to present this information to the Court in the best way possible.

The facts underlying this surveillance as it relates to this case seem to be as follow:

In 1970, when the Central Intelligence Agency and the F.B.I. were caught engaging in illegal surveillance activities against domestic citizens groups, these agencies *formally* stopped having their direct employees engage in this type of domestic spying activity. Instead, however, an elaborate scheme was established by means of which the same domestic spying operations were "contracted out" to domestic surveillance organizations – giving the Central Intelligence Agency and the F.B.I. "deniability" with respect to there operations.

Two highly sensative areas of domestic surveillance were retained under indirect C.I.A. control – with the F.B.I. also playing an important role in these operations. These two areas were: (1) the safeguarding of domestic nuclear power facilities (ranging from simple nuclear power generating facilities to plutonium re-processing facilities such as Kerr-McGee's Cimarron Facility); and (2) the safeguarding of the domestic communication system

used to target, and re-target as well as to communicate with the United States nuclear missles. This latter matter, the Central Intelligence Agency considered to be of an absolute national security interest – having both international, as well as purely *military,* dimensions. The Agency, therefore, refused to relinquish absolute control over the safeguarding of this vital system – no matter what purely *domestic* types of surveillance had to be undertaken. A way had to be found by means of which the Agency could make certain (A) that the necessary surveillance *was* conducted; (B) that the Agency had access to the data collected through such surveillance and (C) that the Agency could deny being involved in the domestic surveillance – if it were uncovered.

Thus, the following system was established:

First: A purely private business corporation was established in Ft. Lauderdale, Florida (right next door to the Executive Airport – where Air America flights used to regularly land engaged in Central Intelligence Agency business). This was the Audio Intelligence Development Corporation, located at 1400 Northwest 62nd Street, in Ft. Lauderdale, Florida. This private corporation had the "cover" of researching, developing and producing *private* electronic surveillance equipment and privately selling it to whatever buyers might want it.

Second: The Executive Department began to send federal monies, through the Law Enforcement Assistance Administration of the Justice Department, to the Audio Intelligence Development Corporation, to finance the research and development of highly sophisticated electronic surveillance equipment, or the type of "hardware" that Richard Nixon so strongly favored to be in the hands of law enforcement agencies.

Third: The Audio Intelligence Development Corporation began doing research into new and extraordinarily sophisticated electronic surveillance equipment (vastly beyond that which would normally be required for any *private* industrial use), developing, such extraordinary devices as the harmonica-amplifier electronic monitoring device.[21]

Fourth: The Audio Intelligence Development Corporation adopted the policy of selling the equipment it developed – and giving *free training to an agent of whatever organization purchased the AID equipment.*

Fifth: "Clients" of the Audio Intelligence Development Corporation began to include SAVAK (the totalitarian secret police of the Shah of Iran) and other secret police of totalitarian regimes "friendly" to the United States CIA.

Sixth: Once this operation was under way, the L.E.A.A. began sending "block grants" of federal investigation, and these domestic state law enforcement agencies refused to keep books recording exactly what was being done with this federally-granted law enforment money.

Seventh: These state-level law enforcement agencies would have *one man* in their state law enforcement *intelligence unit* apply for membership in a nation-wide,

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[21]This device can be hooked to any regular telephone and used to "wiretap" any other telephone in the world simply by placing a call on the phone to which it is attached to the telephone to be "tapped". Once the call is placed, the circuit is closed, the receiving telephone is tapped – for as long as the device is left on the calling telephone. *Moreover,* the harmonica-amplifier is equipped with an "over-ride" which overrides the "cut-off" usually engaged when the receiving phone is hung up – resulting in the phone being "bugged", even when the receiver is *down.* Thus, the receiving telephone becomes an electronic monitoring device in the home, monitoring all conversations in the room where the telephone is located – even when no one is using the telephone.

private, fraternal organization by the name of the Law Enforcement Intelligence Unit.[22]

Eighth: These state law enforcement intelligence units would then use a portion of the L.E.A.A. block-grant money given to them by the Justice Department and purchase, from the Audio Intelligence Development Corporation in Florida, some of the highly sophistocated electronic surveillance equipment and use more of this money to sent their L.E.I.U. agent down to Florida to the Audio Intelligence Development Corporation to be trained, free of charge, in unlawful electronic surveillance techniques.

Ninth: The L.E.I.U. representative would then return to the state from which he came, fully-equipped with AID electronic surveillance equipment, and undertake unlawful regional surveillance against political dissidents, members of politically unpopular local citizens organizations *and* all of the persons that the Central Intelligence Agency and F.B.I. wanted placed under surveillance (for the purpose of allegedly protecting nuclear facilities against "potential terrorists" and even "potential dissidents".

Tenth: Once this methodology was developed, members of municipal law enforcement intelligence units began to purchase electronic surveillance equipment from the Audio Intelligence Development Corporation in Florida with L.E.A.A. block-grant monies, and to send an individual to AID for training.

Eleventh: These municipal law enforcement intelligence agents would then return to their municipalities to conduct

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[22]This Law Enforcement Intelligence Unit consists of some 224 *private* members, each one of which, in his public life, is an *intelligence* officer in a large municipal or state law enforcement intelligence unit. See Exhibit #11 for a general description of this organization.

the requested surveillance, using the training and equipment paid for with L.E.A.A. block-grant monies.

Twelfth: All information collected by these agents would be conveyed to the nearest L.E.I.U. member, who, in turn, would place the information gathered through this surveillance on one of 125 regional intelligence computers financed by L.E.A.A. grant # 75.55.99.60.08

Thirteenth: This information would be conveyed to the central Search, Inc. Pointer-Name-Index computer until recently located in Old Police Barricks #2, Harrison Road, 2nd Floor, East Lansing, Michigan.[23]

Fourteenth: The Central Intelligence Agency has caused this computer to be equipped with an electronic device which allows the Agency to remove from this intelligence communication system all of the information stored therein without any "drawn-down" on the system which would enable such a withdrawal to be noticed.

Fifteenth: The information withdrawn from this system by the Central Intelligence Agency is kept by the Central Intelligence Agency and is used as the basic data bank on the basis of which intelligence estimates are prepared by the Agency to protect nuclear facilities and the United States' nuclear missle communications system.[23A]

The system is neat – and the patent illegality of it's CIA supervision is "covered" by two of the Executive Department's most carefully guarded secrets – (1) the Executive Department's ability to wiretap telephones with such

[23]This computer has very recently been moved to Sacramento, California.

[23A] See Exhibit #18.

devices as the harmonica-amplifier electronic monitoring device, and (2) it's ability to withdraw all information from governmentally-provided intelligence computer systems without any trace – and even without the knowledge of the "guardians" of the system.

This appears to be the system which was in operation against Karen Silkwood and her union associates at the Kerr-McGee Nuclear Facility in the Fall of 1974.

James Reading, as Kerr-McGee's Security Chief, supervised her surveillance; William Vetter, as the head of the Oklahoma City Police Department's Intelligence Unit, had the equipment, the trained personnel and the experience to perform the task when asked by James Reading in closed-door meetings together during October of 1974 – See Affidavits attached hereto as Exhibits); Larry Baker and his associates in the Oklahoma City Police Department's Intelligence Unit were in the habit of performing unlawful electronic surveillance against citizens in the Oklahoma City area during the Fall of 1974 (See Affidavits attached hereto as Exhibit); William Vetter and his associates have the illegal equipment needed to perform this task and are unable to give any lawful reason for their being in possesion of this equipment; and Jacque Srouji has admitted being told by James Reading that he performed this illegal surveillance against Karen Silkwood and her associates (See Stockton Affidavit attached hereto as Exhibit #4). Jacque Srouji has admitted having copies of the typed transcripts of these unlawfully monitored private conversations – but she simply refuses to turn these over to the Plantiffs.

It is the contention of the Plaintiffs that Jacque Srouji is in possession of documents and tape recordings proving the substance of the Plaintiffs' charges and that she came into the otherwise surprising possession of this evidence in

her special capacity as a trusted clandestine domestic surveillance operative with an established working relationship with Lawrence J. Olson – the senior F.B.I. Agent assigned to investigate Karen Silkwood's harrassment, radioactive contamination and mysterious death.

It is because of the critically of the issue of Mrs. Srouji's credibility in regard to her peculiar access to internal F.B.I. domestic intelligence information that the Plaintiffs need to explore Mrs. Srouji's historical relationship with Agent Olson and the F.B.I. For this same reason, it is necessary for the Plaintiffs to explore Agent Olson's history as it relates to domestic surveillance of citizens groups and any history he might have in concealing knowledge about illegal electronic domestic surveillance condoned by the F.B.I.

In 1965, Lawrence J. Olson recruited Jacque Srouji, then a newspaper reporter for the Nashville *Banner,* to use the color of her newspaper reporter credentials to interview members of certain lawfully conduct domestic surveillance. Lawrence Olson "targeted" the lawful groups against which Jacque Srouji was to conduct the unlawful surveillance for the F.B.I. and Jacque Srouji either directly interviewed members of this group (filing her "report" *not* with her paper, but, instead, with the F.B.I.) or she infiltrated the organization, using the explanation that she was just a newspaper reporter trying to get an inside story – if she got caught gathering data on the organization. Exhibit #21

During the 1960's Agent Olson directed Jacque Srouji's unlawful domestic surveillance against such citizens' organizations as the southern civil rights movement; the student movement; the anti-Viet Nam War movement and sympathizers with the Palestine Liberation Organization.

Defendant Olson also tried to recuit other newspaper reporters to infiltrate such organizations as the National Organization for Women. See Exhibit #21 attached hereto.

While in Nashville, Defendant Olson was involved with the F.B.I. Colntelpro operatives who wiretapped Dr. Martin Luther King and placed illegal electronic eavesdropping equipment in Dr. King's hotel rooms in Tennesse. It is the Plaintiffs' understanding that Lawrence Olson offered to play the "bedroom tapes" of Dr. Martin Luther King to MR. G.I. Merritt, the former U.S. Attorney in Nashville, Tennesse, which tapes Defendant Olson admitted having in his possession.

As an active domestic surveillance operative for the F.B.I., Lawrence Olson was transferred to Oklahoma in 1972, and assigned by the F.B.I. to undertake the coordination of the security of the Kerr-McGee Nuclear Facility. It was also in the 1970's that Jacque Srouji was asked to write a book about nuclear power "to establish contacts in this area". See F.B.I. documents attached hereto as Exhibit . During the course of writing this book, Jacque Srouji used the color of her credentials as a journalist writing a book on nuclear power to gather domestic intelligence data for the F.B.I. See Seignethaler Affidavit attached hereto as Exhibit #21.

On November 21st, 1974, Lawrence Olson was assigned by the F.B.I. to investigate the radioactive contamination of Karen Silkwood, her mysterious death and charges made alleging that she was the victum of a Kerr-McGee criminal conspiracy to harrass her and to injure her as a result of her labor union activities and because of her having filed reports with the Atomic Energy Commission accusing the Kerr-McGee Corporation of violating the Atomic Energy Act.

On November 21st, immediately after having ben given this assignment, Lawrence Olson secretly contacted James Reading (one of the most logical suspects in any such harrassment conspiracy) and met with him to notify him about the F.B.I. investigation against him and his company. At this meeting, Lawrence Olson explained what evidence might be incriminating if found, and he asked James Reading to set up a private meeting between Larry Olson and highly-placed Kerr-McGee officials and their legal counsel as soon as possible – so he could warn them about the impending F.B.I. criminal investigation.

This second meeting took place on November 25, 1974. At this meeting, Lawrence Olson explained, in detail, the criminal statutes the violation of which by Kerr-McGee agents he had been asked to investigate. At this meeting, Defendant Olson went so far as to go over, line-by-line, with the Kerr-McGee officials, their legal counsel, and with the Chief of their Security Division (whom Jacque Srouji says admitted wiretapping Karen Silkwood) the particular statutes they were to be investigated for having violated. (See Reading Deposition) Exhibit #22

At this meeting, Lawrence Olson agreed to work *with* James Reading to steer the investigation *away* from any inquiry into potential criminal wrong-doing by Kerr-McGee agents (the logical potential violators of the particular statutes Agent Olson was directed to investigate) and to transform his investigation into an effort to manufacture evidence to falsely indicate that Karen Silkwood had intentionally contamined herself in some bizzar conspiracy to embarrass the entire nuclear industry. See March 4th Memo obtained from Kerr-McGee during discovery attached hereto as Exhibit .

Defendant Olson then established a procedure in accordance with which he interviewed Kerr-McGee employees

in a manner which virtually assured that he would obtain no evidence of any Kerr-McGee harrassment of O.C.A.W. union members. He went to the Kerr-McGee Cimarron Facility and officially notified Kerr-McGee management personnel that he was going to interview a given employee. He then had management officials of Kerr-McGee publicly contact the worker to be interviewed and taken from his job assignment during working hours to be interviewed. Then, *in the presence of James Reading* (Kerr-McGee's Chief of Security) Defendant Olson asked the individual employee if he had any accusations to make to Reading and Olson regarding Kerr-McGee harrrassment of employees for their union activities. When a few workers declined to communicate any such complaints to him under those circumstances, Defendant Olson formally closed the investigation into allegations of anti-union harrassment by Kerr-McGee management officials. (See testimony by Lawrence Olson and F.B.I. Assistant Director James B. Adams attached hereto as Exhibits #27 and #23.

Defendant Olson never investigated the possibility that Kerr-McGee officials had anything to do with Karen Silkwood's automobile accident. Rather, he simply accepted, without investigation, the Oklahoma State Highway Patrol's November 14, 1974 unanalyzed conclusion that Karen Silkwood fell asleep at the wheel of her car at 7:30 p.m. while on the way to meet with a *New York Times* reporter to deliver documents to him regarding Kerr-McGee violations of the Atomic Energy Act. Defendant Olson never so much as spoke with the professional automobile accident reconstruction laboratory experts who scientifically concluded that Karen Silkwood's car had been rammed in the rear and driven from the highway into a concrete bridge abutment. Defendant Olson also admitted that he *never* investigated the possibility that karen

Silkwood had been intentionally contaminated by Kerr-McGee agents – because that would hvae required some kind of conspiracy on the part of Kerr-McGee agents, and he never so much as entertained a suspicion of that possibility. See Olson testimony to Congress and Reading's Deposition. Exhibit #22

Instead, Olson worked directly *with* Reading, trying to prove that Karen Silkwood had intentionally contaminated herself, and he introduced James Reading to F.B.I. officials, who, in turn, set up social meetings with highly-placed Kerr-McGee officials for luncheons – right while the F.B.I. was supposed to be investigating these officials for potential criminal wrong-doing against Karen Silkwood. See Exhibit #22 attached hereto.

To explain away how to the bologna in Karen Silkwood's home refrigerator had become contamined with deadly plutonium, Kerr-McGee Defendant James Reading and Co-defendant Lawrence Olson went so far as to attempt to convince others that Karen Silkwood had been smuggling deadly radioactive plutonium out of the Kerr-McGee Nuclear Facility in her vagina – and had contaminated the bologna in her home while "abusing herself (of masterbating) with the bologna". See Exhibit #24

This latter accusation was part of a plan, intrinsic to the "cover-up" efforts of the conspiracy among the Defendants, to steer attention away from themselves by explicitly "smearing" the Plaintiff Karen G. Silkwood and other persons in her citizens' group with scurrilous stories about their sex lives, their recreational use of alcohol or marijuana or their life-styles – which information would be either taken from, or constructed on the basis of, the illegally compiled "dossiers" prepared on members of this citizens' group through the illegal surveillance activities of

the agents of the Defendants. Subsequent to these November, 1974 meetings at which these agreements were entered into between various of the individually-named Kerr-McGee Defendants and Co-defendant Olson, all of the contemplated "cover-up" actions were, in fact, undertaken by either the Defendants or their agents in the conspiracy.

In February of 1975, Defendant Olson was contacted by F.B.I. officials from Nashville, Tennessee and told that Jacque Srouji was going to be coming to Oklahoma City to work on the Karen Silkwood investigation with Olson. Olson was directed to cooperate with Srouji and to give her all of the information he had about Silkwood. At that same time, Srouji was to be de-briefed by Olson concerning top-secret information Srouji had been collecting for the Bureau through the use of her newsreporter credentials relating to domestic nuclear policy matters. (See Olson Deposition

Srouji arrived in Oklahoma City, in March, as planned, gave Olson the classified information requested, and Olson gave Srouji access to his Silkwood files. She Xeroxed his file, and was later set up with a secret meeting with James Reading by Olson.

At this March, 1975 meeting, held at the Hilton Hotel in Oklahoma City, Olson, Reading and Srouji discussed their joint Silkwood endeavor, and James Reading explained the illegal electronic surveillance he and his associates had undertaken against Karen Silkwood and her associates at the Kerr-McGee Nuclear Facility.

At this meeting, Srouji joined the on-going conspiracy to cover-up the Kerr-McGee wrong-doing against Silkwood and her associates, and Reading gave her copies of his investigative reports (including copies of the

transcripts of the Silkwood conversations) which she was authorized to use in her effort to white wash Kerr-McGee's involvement in the Silkwood matter.

Pursuant to her agreement, Co-defendant Srouji: (1) destroyed documentary and tape recorded evidence of the wrong-doing of the Defendants and their co-conspirators;[24] (2) committed perjury before the United States Congress;[25] (3) committed perjury before the United States District Court for the Western District of Oklahoma;[26] (4) went before the United States Congress and, pursuant to this agreement among the Defendants, tried to dennograte both Ms. Silkwood and all of the members of the citizens' group to which she belonged (which effort "to blast the Union" Ms. Srouji has now admitted, under oath, to F.B.I. investigators);[27] and (5) committed willful perjury in the District of Tennessee.[28]

After direct conversations with Defendant Olson, Defendant Reading and other members of the on-going conspiracy, and after having agreed to assist in the cover-up portion of the conspiracy, pursuant to the objective of the illegal conspiracy directed at depriving members of Karen Silkwood's union of their basic rights, Jacque Srouji established contact with Congressional investigators in the Fall of 1975 and the Spring of 1976 and tried to steer the Congressional investigators away from investigation or discussing the criminal acts done by her co-conspirators

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[24]See Srouji Second Deposition.

[25]See Srouji testimony before Congress. Exhibit #5.

[26]See Srouji First Deposition.

[27]See Srouji discussions with the F.B.I. and Affidavit of Peter Stockton. See Exhibit #5 and 4.

[28]See Srouji Second Deposition.

against Karen Silkwood and members of her union and toward having Congress "blast" the union.[29] In pursuit of the objectives of the Co-defendants conspiracy, Jacque Srouji tried to gain the confidence and co-operation of Congressional Investigator Peter Stockton by accusing Karen Silkwood of sexual misconduct, drug abuse and other improper activities. In furtherance of her effort to convince Congressional Investigator Stockton of these improprieties on the part of Karen Silkwood, Jacque Srouji revealed to Congressional Investigator Stockton that the Kerr-McGee Defendants had wiretapped Karen Silkwood, had placed illegal electronic eavesdropping equipment in her home and had Ms. Silkwood kept under full-time physical surveillance for many weeks prior to her death.[30] In furtherance of this same objective, Jacque Srouji admitted to Peter Stockton that she was a full-time undercover investigator for the F.B.I., with a long history of working directly with F.B.I. investigator Lawrence Olson — the agent in charge of the Silkwood investigation. In still further pursuit of this objective of turning Congressional investigators away from the wrong-doing of the Defendants which had been undertaken against Ms. Silkwood, Jacque Srouji revealed that she had been put into secret contact with Defendant James Reading (the Director of Security for the Kerr-McGee Corporation) directly by F.B.I. agent Lawrence Olson and had attended a secret conference with Mr. Reading set up, and attended by, Defendant Olson. At this meeting, directly sponsored by F.B.I. agent Olson, Srouji told Peter Stockton, she had

[29]See Stockton Affidavit and F.B.I.-Srouji discussions attached hereto as Exhibit #4 and #10.

[30]Id.

been told of this wiretapping and eavesdropping proof of Karen Silkwood's improprieties.[31] This, she argued, (pursuant to the objective of the illegal conspiracy) should convince Congressional Investigator Stockton that the concern about what happened to Ms. Silkwood was entirely misplaced, and that she was not deserving of any Congressional inquiry. Moreover, Jacque Srouji told Mr. Stockton that she had shared all of this wiretapping and eavesdropping information with Lawrence Olson and there was no need for Congressional investigators to make any further inquiries into this matter.

Knowing that Peter Stockton was in communication with Mr. Howard Kohn, the Associate Editor of *Rolling Stone Magazine,* Jacque Srouji repeated these statements to Mr. Kohn, to cause these facts to be confirmed to Mr. Peter Stockton via Mr. Kohn, so as to cause the Congressional investigation to be steered away from investigating the wrong-doing of the co-conspirator Defendants.[32]

All of these activities of the Co-defendants have continued right up to, and including, the present – resulting in the latest planned perjury when Defendant Lawrence J. Olson, on October 20, 1977, knowingly lied to this Court, swearing that he had never set up, or attended, any private meeting between Co-defendant Jacque Srouji (a proven covert surveillance operative for federal intelligence-gathering organizations) and Co-defendant James Reading (one of the Defendants directly responsible for the wiretapping and surveillance carried on against Ms. Silkwood). (See Olson Deposition)

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[31]See Affidavit of Peter Stockton. Exhibit #4.

[32]See Affidavit of Howard Kohn attached hereto as Exhibit #17.

Special Note

Plaintiffs investigators have verified that, during the Fall of 1974, five Oklahoma City men were actively engaged in the practice of unlawful wiretapping and electronic surveillance in the Oklahoma City area exactly like that which Defendant Srouji says was being committed against Karen Silkwood during this period. These men are William Vetter, Larry Baker, A. J. Clovis, B.J. Brown and Larry Upchurch. William Vetter was the man who directed these activities. Larry Baker was primarily responsible for executing the wiretaps. Larry Upchurch specialized in the breaking and entering which were performed in some instances to install some of the electronic surveillance devices.[33]

As of January of 1978, the Plaintiffs intended to present three important witnesses to the Court to substantive the Plaintiffs' allegations as regards these matters. These men were Mr. Leo Goodwin, the President of the Audio Intelligence Development Corporation, located at 1400 Northwest 62nd Street in Ft. Lauderdale, Florida; Mr. Thomas Bunting, the Oklahoma representative of a private organization by the name of the Law Enforcement Intelligence Unit; and Mr. William Lovin, a member of the "Risk Management" Division of the Georgia Power Company. Two of these witnesses are now dead, and the third is missing, as of March 31st.

Mr. Goodwin was able to testify about the training in illegal electronic surveillance methods being given at the Audio Intelligence Development Center down in Ft. Lauderdale, Florida – free of charge, with electronic surveillance equipment purchased from that corporation.

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[33]See Exhibit #19.

He also had custody of the records of that company revealing who was trained to use this illegal equipment. Contact was established with Mr. Goodwin on January 15, 1978 and the Plaintiffs' investigators were scheduled to meet with him on the evening of January 18th. Mr. Goodwin died of a coronary attack on the afternoon of January 18th.

Thomas Bunting was the Oklahoma representative of an organization by the name of the Law Enforcement Intelligence Unit. The Plaintiffs subpoenaed Mr. Bunting in October of 1977 on the basis of information indicating that Mr. Bunting was a key conduit of illegally-obtained electronic surveillance information gathered in the Oklahoma City area which was being relayed to the Federal Executive Department via L.E.I.U. computers financed by the federal Law Enforcement Assistance Administration.

Subpoenas were issued to the L.E.I.U. by the United States House of Representatives' Investigations Committee in February of 1978, to inquire into evidence in the hands of the Congress indicating that members of the L.E.I.U. have been engaged in unlawful political surveillance against domestic citizens' groups throughout the country.

This Court entered an Order on March 7, 1978 directing Mr. Bunting to appear in Oklahoma City on April 10, 1978 to answer questions to be put to him by the Plaintiffs. Mr. Bunting died of a coronary on Monday, March 13th. To date, no other member of the Oklahoma State Bureau of Investigation has applied for membership in the private L.E.I.U., but the Plaintiffs understand that one Harvey Pratt will replace Mr. Bunting in this position.

Mr. William Lovin, who was an employee of the Georgia Power Company's "Risk Management" Division,

had given ample information to the Plaintiffs concerning the "method of operation" being used by American nuclear facilities to conduct unlawful surveillance against workers at these facilities in co-operation with the L.E.I.U. and local police intelligence units. When investigators returned to speak with Mr. Lovin had remained in constant communication with representatives of the Plaintiffs right up to his disappearance.

Because of the non-availability of these three witnesses, the Plaintiffs are submitting to the Court three Attorney's Affidavits, detailing evidence which the Plaintiffs had anticipated presenting to the Court through these three witnesses.

The Need For Additional Witnesses

In light of the recent non-availability of Thomas Bunting, the Plaintiffs would like permission to present to the Court a few witnesses who know about the unlawful wiretapping and electronic surveillance activities which have been underway in the Oklahoma City area over the past five years – which information was known to Mr. Bunting.

This matter will be discussed with the Court on April 10th.

Conclusion

If the jury believes the sworn testimony of Congressional Investigator Peter Stockton in which he swears that Defendant Jacque Srouji told him that Defendant James Reading openly displayed to her of typed transcripts of wiretapped and electronically-recorded private conversations of Karen Silkwood and her union associates during her March 1975 meeting with James Reading, arranged and attended by Defendant Lawrence J. Olson, all of the

additional evidence set forth by the Plaintiffs supporting the existence of a conspiracy against Ms. Silkwood and her associates falls into place as credible evidence of a probative nature demonstrating the existence of the civil rights conspiracy alleged in the Plaintiffs' Complaint. The evidence submitted by Howard Kohn and John Seigenthaler directly bolster the credibility of Mr. Stockton's sworn testimony.

The evidence tendered by the Plaintiffs shows motive, opportunity and strong circumstancial evidence proving the existence of the conspiracy alleged.

So long as the Court accepts the Plaintiffs' legal argument demonstrating the non-hearsay nature of Jacque Srouji's admissions about the wiretapping and electronic surveillance made to Mr. Stockton, then all of the other evidence demonstrating the conspiracy becomes probative and must be put to the jury for its evaluation.

Jacque Srouji said the activity was going on; she was in a position to learn that it was going on; James Reading had the motive to do it, the associates who had the equipment and the proclivity to do the surveillance; and significant other evidence shows that the Kerr-McGee Corporation was, during 1974, actively engaged in a civil conspiracy to deprive the O.C.A.W. members employed at the Cimarron Facility of their rights.

The Plaintiffs view the present submission to the Court to be only preliminary to the Plaintiffs' final factual submission on this point – which will be submitted, in detail, upon the completion of the factual discovery in this case.

APPENDIX

INDEX

1. Exhibit #1 — Dean McGee Deposition November 21, 1977 pp. 20-22

2. Exhibit #2 — James V. Smith

3. Exhibit #3 — Sworn Congressional Testimony of Anthony Mazzochei, Vice President of the Oil, Chemical and Atomic Workers Union, April 26, 1976, Before the House Subcommittee on Energy & Environment, Official U.S. Government Document #80-839 pp. 21-30

4. Exhibit #4 — Peter D. H. Stockton; Affidavit of United States Congressional Investigator

Professional Investigator for the Senator Government Operations Committee and For the House Subcommittee on Energy and the Environment Regarding the Kerr-McGee-Silkwood Matter

5. Exhibit #5 — Jacque Srouji: Sworn Congressional Testimony Before the United States House of Representatives' Subcommittee on Energy and the Environment April 26, 1976, Official U.S. Government Document #80-839 pp. 242-263

6. Exhibit #6 — Steven Wodka; Sworn Congressional Testimony Assistant Washington Representative of the Oil, Chemical & Atomic Workers Union, April 26,

1976, Official U.S. Government Document #80-839, pp. 40-41 & attachment

7. Exhibit #7 — Gerald Brewer; Deposition

8. Exhibit #8 — Internal Kerr-McGee Memorandum; Dated Dec. 30 1974. . . . Evidencing Kerr-McGee Management Order to Employees Prohibiting Any Contact With the Media about Working Conditions at the Cimarron Facility.

9. — February 15, 1978, Letter From FBI Director Clarence Kelley to Silkwood Attorney Sheehan Bevealing Existence and Location of National Labor Relations Board Investigative File Entitled ¶ "Kerr-McGee Nuclear Corporation, Cimarron Facility, E-16-Ca-5905", Containing NLRB Evidence and 1975 Conclusion as to Civil Violations of the National Labor Relations Act by the Kerr-McGee Corporation Against OCAW Negotiation Team of Which Karen Silkwood Was a Member.

and

Copy of OCAW Complaint and Initial NLRB Response.

and

Pre-December 1, 1977, Evidence Available to the Plaintiffs Indicating That the NLRB Had Not

and

Evidence of Plaintiffs' Unsuccessful Efforts to Obtain These Documents Voluntarily From the NLRB Without Subpoena Power.

10. Exhibit #10 — Copy of Officially-Provided F.B.I. Documents of Sworn Statement By Defendant Jacque Srouji Stating that She was In Physical Possession of Restricted Internal F.B.I. Documents; Swearing That She Was Never In Possession of Such Internal F.B.I. Documents; and Sworn F.B.I. Statements of Defendant Srouji Swearing that She Has Decided to Commit Perjury in the Silkwood Case Rather Than Admit Her Possession of F.B.I. Documents.

11. Exhibit #11 — Sworn Deposition of Non-Party John H. Taylor Explaining the Nature of the Illegal Dossiers And Intelligence Files Kept by Private Nuclear Corporations on Their Workers, The Telephone Monitoring Done and Other Illegal Activities Undertaken by Security Personnel at Such Facilities

and

Investigative Report Citing Discussions With William Lovin In Which Details Were Given To The Plaintiffs Describing There Activities And the Participation In Them of Local Police Intelligence Units and L.E.I.U. Representatives

12. Exhibit #12 — Official F.B.I. Document Volume 97-4, Page 8 Detailing False Swearing of Defendant Lawrence J. Olson to Government Officials About the Karen Silkwood Matter; The Incompleteness

of His Reports; Olson's Having "Made Arrangements" For Srouji in Oklahoma, etc.

13. Exhibit #13 — Portions of Deposition of Kerr-McGee Plant Supervisor James V. Smith In Which He Describes the "Searching" of Karen Silkwood's Home by Kerr-McGee Agents – *Not* For Radiation – But, Instead, For Personal Effects Which Kerr-McGee Wanted to Use Against Her.

14. Exhibit 14 — Examples of Official F.B.I. Documents, Kerr-McGee Documents and Deposition Testimony Evidencing That the Plutonium On The Food in Karen Silkwood's Home Came From Kerr-McGee Plant Lot #29

15. Exhibit #15 — Copy of Official Evaluation of the Texas Accident Reconstruction Laboratory – Evidencing That Karen Silkwood's Automobile Was Struck By Another Vehicle and Forced From The Highway In November of 1974

16. Exhibit #16 — Copy of F.B.I. Documents Revealing Kerr-McGee Agents' Entrance Into Karen Silkwood's Automobile on the Night of November 13, 1974 and Removal of Property And Absence of Documents

and

Sworn Statement of Witness Jean Jung Stating That She Saw Karen Silkwood With The Folder of Kerr-McGee

Documents When Just Before Ms. Silkwood Left The Hub Cafe To Go To The November 13th Meeting With *New York Times* Reporter David Burnham

17. Exhibit #17 — Affidavit of Howard Kohn Evidencing Statements Made By Defendant Jacque Srouji About Her Possession of James Reading Transcripts of Wiretapped and Electronically-Monitored Private Conversation of Karen Silkwood and her Union Associates

18. Exhibit #18 — Affidavit of Silkwood Attorney Daniel Sheehan Explaining the Facts Evidenced by Plaintiffs' Investigations, With Examples of Investigative Memoranda Submitted to Attorney Sheehan By Professional Investigators – Offered as Preliminary Substitution For Witness William Lovin, Who Is Now Unavailable To The Court – Evidencing Information Which Oklahoma Representative of the Law Enforcement Intelligence Unit Thomas A. Bunting Possessed Prior to His March 13 197 Death

19. Exhibit #19 — Affidavit of Silkwood Attorney Daniel Sheehan Explaining the Facts Evidenced by Plaintiffs' Investigative Memoranda Submitted to Attorney Sheehan By Professional Investigators – Offered In Support of the Reasonable Belief That Personnel of the Intelligence Division of the Oklahoma City Police Department Were Engaged In Illegal Wiretapping

In the Fall of 1974 – And That, Specifically, William Vetter is Familiar With These Practices

20. Exhibit #20 — Affidavit of Silkwood Attorney Daniel Sheehan Explaining Facts Possessed By the Plaintiffs, With An Example of the Investigative Reports, Evidencing That William Vetter Was Seen Visiting With Defendant James Reading During the Time Karen Silkwood Was Wiretapped

21. Exhibit #21 — Affidavit of John Seigenthaler, Publisher of the Nashville *Tennessean* Newspaper and Former Special Assistant Attorney General to Robert Kennedy and a Copy of His Sworn Testimony Presented to the United States Congress on May 6, 1976 Relating to Statements Made to Him by Defendant Jacque Srouji

22. Exhibit #22 — Portions of Sworn Deposition of Defendant James Reading Given on October 21, 1977, Discussing His Initial Meetings With Defendants Lawrence Olson and the "Thrust" of Their "Investigation" Concerning the Karen Silkwood Matter

and

Examples of Internal Kerr-McGee Memoranda From Defendant James Reading Describing His Close Working Relationship With the F.B.I. During the Lawrence Olson "Investigation" of Kerr-McGee

23. Exhibit #23 — John B. Adams: Sworn Testimony of Him (Deputy Associate Director of F.B.I.) Submitted to Congress May 6, 1976

24. Exhibit #24 — Howard Kohn's March, 1975 Rolling Stone Article

25. Exhibit #25 — Portions of October 20, 1977 Deposition of Lawrence Olson In Which He States That Jacque Srouji Was Being De-Briefed in March and April of 1975 (During He Discussions with Him About Karen Silkwood) On Top Secret Matters – And that Defendant Srouji Was An F.B.I. Informant.

26. Exhibit #26 — Portions of Defendant Jacque Srouji's June 23, 1977 Deposition Where She States That She Put Out of Her Possession Silkwood Materials After Receipt of Her Subpoena

Exhibit #4

Affidavit of United States Congressional
Investigator Peter D. H. Stockton

Professional Investigator for the
Senate Government Operations Committee

and

For the House Subcommittee on
Energy and the Environment
Regarding the Kerr-McGee-Silkwood Matter

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

KAREN G. SILKWOOD, by the Administrator of her estate, William M. Silkwood; and Beverly K. Meadows; Michael E. Meadows; and Dawn E. Meadows; the infant heirs of Karen G. Silkwood by their Guardian, William E. Meadows, *Plaintiffs,*	)	No. CIV-76-0888-Thels
vs.	)	
THE KERR-McGEE CORPORATION, et al., *Defendants.*	)	

AFFIDAVIT OF UNITED STATES HOUSE OF REPRESENTATIVES INVESTIGATOR PETER D. H. STOCKTON SUBMITTED IN OPPOSITION TO THE DEFENDANTS' MOTION FOR SUMMARY DISMISSAL OF THE PLAINTIFFS' COMPLAINT

Peter D. H. Stockton, having been duly sworn, hereby deposes and says the following:

Notes on the Srouji Affair

On December 12, 1975 Srouji made her first contact with the Senate Subcommittee. During the conversation she claimed that she had copies of all the FBI documents

relating to the various investigations by the FBI into the Silkwood matter. This was obvious interest and concern to the Subcommittee in that the FBI had successfully witheld these same documents from the Senate Government Operations Committee while at the same time it appeared that a copy editor of the Nashville Tennassean had been given access to these FBI documents. Of course it has been recently learned from released FBI documents that Srouji dutifully reported this meeting with the Subcommittee staff to agents at FBI headquarters in Washington immediately following the meeting.

– Within a day or two I called Srouji, who had returned to Nashville, indicating I was interested in going to Nashville to review her FBI documents and any other information in her possession that would help in the Subcommittee's inquiry. She assured me she would give me full access to all her documents.

– By the time I arrived in Nashville Srouji already had had second toughts about her promise of full access to the FBI documents. She did not show me some documents with FBI evidence tape on them, letters from Special Agent Larry Olson, Kerr-McGee documents but claimed she was withholding the FBI letterhead memoranda, interview transcripts, etc. until receiving a Subcommittee subpoena.

– During about six hours of conversation in Nasvhille, she indicated that she had a close relationship with the FBI and especially Larry Olson during the 1960's when he was a S.A. in the Nashville office; that she learned that he was working on the Silkwood investigation in Oklahoma City; she had met with him on various occasions during her visits to Oklahoma City; that he had made the FBI files relating to Silkwood available to her – which she xeroxed; and that he had arranged a meeting between Srouji and James Reading, the K.M. Chief investigator.

– In our discussions Srouji had two main themes:

- that Karen Silkwood was sexually promiscuous, smoked marijuana, was mentally unstable and therefore no credibility should be assigned to any allocations she made about the company.

- that somehow the OCAW union was behind the whole Silkwood matter because Tony Mazzochi was a member of the board of NRDC and was anti-nuclear and that Silkwood may have only been a pawn in this overall union scheme. Srouji even carried this to the extent that she claimed OCAW officials may have been responsible for Silkwood's contamination and accident.

– Srouji also claimed that the FBI documents indicated that SA Olson had requested authorization for an investigation of the national unions activities, but was turned down by FBI headquarters in Washington.

– I indicated to Srouji that the Congress was specifically interested in reviewing the adequacy of the Federal response to the various incidents that occurred at the KM facility including the AEC handling of the union allegations concerning health and safety problems as well as quality control problems. This was both an oversight function as well as a determination as to whether the various agencies had adequate statutory authority to respond to serious incidents at a nuclear facility. (As you know Government investigations and committee testimony has shown that Karen Silkwood's allegations were corroborated.) Although Silkwood's sex life was of great interest to Justice Department investigators and AEC officials, it was of no interest to the Subcommittee.

– It became clear after the first few conversations with Srouji that her objective was – as she later told the FBI –

to "blast" the union and redirect the focus of the Congressional investigation. She also emphasized the fact that the FBI had done thorough investigation and should not be criticized.

– It was in the context of Srouji's discussion of Silkwood's background including her drinking and sex habits that she first brought up the subject of surveillance.

– Srouji indicated that she was surprised at the incredible detail of conversations and events in some of the KM documents that had been supplied by Jim Reading. She said that she had discussed this with Reading who indicated that his group had conducted surveillance of Silkwood and apparently some of her union associates as well. Srouji claimed that she had copies of transcripts of what appeared to be the product of both phone taps and bugs.

– Although she made a number of KM documents available to the Subcommittee staff the transcripts and the FBI documents were not included.

– After my first few contacts, Srouji claimed she had been contacted by an FBI agent in Tennessee who gave her "friendly advice" to the effect that she would be careful and not cooperate with the Subcommittee investigations.

– I met with Srouji on at least four or five occasions. The subject of surveillance came up in at least two of our meetings in Washington. She either couldn't or wouldn't get any more specific about the surveillance. She indicated at one point that KM may have had a third party conduct the surveillance suggesting possibly Pinkerton's probably because they had come up in connection with a KM background check of the union accident investigator, Mr. Pipkin.

– Although this was an issue of interest to the Subcommittee – especially after the FBI testimony on the maintenance of FBI files on nuclear critics – for a number of reasons we were unable to pursue this issue.

/s/ Peter D. H. Stockton

PETER D. H. STOCKTON

Notary Public Seal

International Union

ANTHONY MAZZOCCHI, DIRECTOR
CITIZENSHIP-LEGISLATIVE DEPARTMENT

January 21, 1975

Mr. John G. Davis
Deputy Director for Field Operations
U.S. Nuclear Regulatory Commission
Washington, D.C. 20545

Dear Mr. Davis

I am writing this letter to bring to your attention certain actions taken by Kerr-McGee Nuclear Corporation against employees at it Cimarron Facility, Crescent, Oklahoma, which we believe to be in violation of Section 19.16(c) of the Commission's Regulations. We respectfully request that the Commission promptly investigate this matter and take all appropriate remedial action.

As you know, the Commission, at the request of OCAW, has recently conducted extensive investigations of safety and health conditions and certain quality control practices at the Cimarron Facility. These investigations were prompted by charges originally brought to the Union by some of the employees and then transmitted to the Commission by the Union. A number of employees of the Company provided information to the Commission's inspectors in connection with those investigations. As a result, various safety violations and other improper practices were brought to light.

The Company has now responded to these events by launching a campaign of harrassment and intimidation against its employees, the obvious purpose of which is to punish them for for taking their complaints to the Union

and the Commission and to deter from ever doing so again. The Company first suggested in public statements that certain incidents which had recently occurred in the plant – including a spill of some radioactive material and the appearance of some uranium pellets on the ground outside the plant – had been "contrived" by the employees themselves. Then, on December 20, 1974, it laid off most of its employees and terminated plant operations for 10 days, ostensibly for the purpose of taking inventory to determine whether any material was "missing" (i.e., stolen) from the plant. During this period, a number of employees – we estimate that the number was somewhere between 15 and 25 – were asked by the Company to submit to polygraph examinations. Those who did so (only a few had courage enough to refuse) were interrogated concerning the following matters:

1. Whether they knew or had ever spoken to Steven Wodka (my assistant who has been coordinated OCAW's activities in connection with the safety and health and quality control investigations).

2. Whether they belong to the Union.

3. Whether they knew or had ever spoken to Karen Silkwood (a Kerr-McGee employee and OCAW member who was actively gathering safety and health and quality control information to deliver to the union and the AEC when she was mysteriously killed in an automobile accident on November 13, 1974).

4. Whether they had recently seen or talked to Drew Stephens (Karen Silkwood's boyfriend, who has been attempting to investigate the circumstances of her death).

5. Whether they had ever stolen anything from Kerr-McGee, or knew anyone who had.

6. Whether they had ever done anything "detrimental" to Kerr-McGee.

7. Whether they had ever mishandled any nuclear materials.

8. Whether they had ever done anything they could be blackmailed for.

9. Whether they had ever falsified any company records.

10. Whether they had ever had an "affair" with a fellow employee.

11. Whether they had ever talked to the "press" (there has been extensive press coverage of the problems at that plant).

While no employee was directly asked whether he or she had ever spoken to a Commission investigator, the questions about contacts with Steven Wodka, Karen Silkwood, Drew Stephens, and the press – and the questions about Union membership – were obviously designated to ascertain who were the "activists" who were cooperating with the Union's and the Commission's investigations. Moreover, the plain purpose and effect of these polygraph examinations was to create an atmosphere of fear and distrust, and to make clear to the employees that they should not be talking to *anyone* outside the Company about problems in the plant. In fact, that precise message was expressly brought home to the employees in a memorandum distributed to them on December 30, 1974, a copy of which is enclosed with this letter. No employees who read that memorandum could fail to understand that it would be highly dangerous to discuss safety problems or other similar matters with anyone except a company supervisor.

After thse polygraph examinations were completed, several employees were transferred from their regular jobs to an isolated warehouse where no nuclear materials are stored or handled. These employees were denied access to most of the other areas of the plant – even during lunch, breaks, or other nonworking time – and were instructed that they must have a supervisor with them at all times, and even be escorted to the bathroom. Two of the employees who received this treatment were Jack Tice, the Chairman of the Local Union, and Jerry Brewer, a former Union Committeeman. Both of these employees were in the group whose charges instituted the Commission's safety and health investigation, and both gave testimony to the Commission's investigators. Indedd, at one point, Tice accompanied a Commission inspector around the plant. Although these employees refused to take the Company's polygraph examination, others who refused were not transferred to the warehouse.

On Monday, January 20, 1975, Brewer was discharged by the Company. The reasons given for this action were (1) a time card irregularity, (2) going to his car during breaktime, and (3) his "attitude." On the same day, Tice was transferred again, this time to the "wet end ceramic area" of the uranium plant, which is reputed to be dirtiest and least desirable place to work in the entire facility. Tice is still prohibited from all access to the plutonium plant, where most of the employees work.

We are convinced that the actions taken against Tice and Brewer were in retaliation for their role in instigating and participating in the Commission's investigation, and that the asserted "reasons" for Brewer's discharge are a mere pretext. Wer are also convinced that the polygraph examinations were intended to intimidate the employees, and to let them know that the Company does not approve

of, and will not tolerate, employees informing against the Company. Unless the Commission takes effective action to remedy and neutralize the intimidatory effects of these actions, the employees will in the future be extremely reluctant to exercise the rights and responsibilities set out in Part 19 of the Commission's Regulations.

We urge you to give this matter your most expeditious consideration, and to take immediate steps to investigate and remedy these violations. If there is any further information you desire from the Union, please contact me or my assistant, Steve Wodka.

Very truly yours,
Anthony Mazzocchi

Exhibit #9

February 15, 1978, Letter From FBI Director Clarence Kelley to Silkwood Attorney Sheehan Revealing Existence and Location of National Labor Relations Board Investigative File Entitled "Kerr-McGee Nuclear Corporation, Cimarron Facility, E-16-Ca-5905", Containing NLRB Evidence and 1975 Conclusion as to Civil Violations of the National Labor Relations Act by the Kerr-McGee Corporation Against OCAW Negotiating Team of Which Karen Silkwood Was a member.

and

Copy of OCAW Complaint and Initial NLRB Response.

and

Pre-December 1, 1977, Evidence Available to the Plaintiffs Indicating That the NLRB Had Not

and

Evidence of Plaintiffs' Unsuccessful Efforts to Obtain These Documents Voluntarily From the NLRB Without Subpoena Power.

UNITED STATES DEPARTMENT OF JUSTICE
Federal Bureau of Investigation
Washington, D.C.

February 15, 1978

Mr. Daniel P. Sheehan
2300 City National Bank
Oklahoma City, Oklahoma 73102

Dear Mr. Sheehan:

Reference is made to your recent visit to FBI Headquarters.

The enclosed documents consist of 9 pages copied from our files pertaining to Karen Silkwood which you requested to be forwarded to you.

Sincerely yours,

/s/ Clarence M. Kelley
CLarence M. Kelley
Director

Enclosures (9)

FBI

Date: 8/13/75

ansmit the following in _____
(Type in plaintext or code)

a AIRTEL _____
(Priorit)

TO: DIRECTOR, FBI (117-2701)

FROM: SAC, OKLAHOMA CITY (117-54) (P)

KERR MC GEE NUCLEAR CORPORATION,
CIMARRON FACILITY, CIRSCENT, OKLAHOMA
AEA: OOJ

ReBulet to Oklahoma City 8/6/75; Oklahoma City teletype to Bureau 3/26/75; Bureau airtel to Oklahoma City 3/27/75, both captioned "UNSUBS; KAREN GAY SILKWOOD (Deceased); LMRDA; OOJ," – Oklahoma City, Bufile 159-4005, Oklahoma City file 159-45.

Referenced Bureau letter of 8/6/75 transmitted to Oklahoma City request of U.S. Department of Justice for investigation relative to captioned case.

As set out in re Oklahoma City teletype 3/26/75, on 3/26/75, National Labor Relations Board (NLRB), Tulsa, Oklahoma, personally contacted to them two cases of possible violations of National Labor Relations Act (NLRA), Section 8 (A), Sub Sections 1 and 3, concerning and both of whom were active in the Oil, Chemical and Atomic Worker's Union as Committeemen, Kerr McGee Corporation (KMC), Cimarron Facility, Crescent, Oklahoma. In the recent past was reassigned to another job at facility and - fired by KMC. adviced his investigation is slanted

toward civil action against KMC if violation substantiated.

6 – Bureau
2 – Oklahoma City
(4) 15 August, 1973

OC 117-54

It is noted that NLRB considers it has substantiated a civil violation of the NLRA on the part of KMC, and has conducted extensive investigation in this regard. Any investigation conducted by FBI, Oklahoma City would be duplicative of NLRB investigation.

REQUEST OF BUREAU

It is requested that the Department be contacted and determine if the Criminal Division of the U.S. Department of Justice has had an opportunity to review the NLRB investigation and, if so, whether or not a review of this investigation suggests a criminal violation of Title 18, U.S. Code, Sections 1505 and 1510 and 10 CFR, Section 19.16(c) and, if so, whether or not the Department would entertain prosecution against KMC in this regard.

It is further requested that it be determined whether or not FBI investigation at this time is warranted in view of current arbitration regarding and .

In the event that the Department does not have possession of NLRB report re captioned matter, *it is requested that the Bureau contact NLRB through liaison and secure copy of this report for departmental perusal.*

Oklahoma City is holding investigation in abeyance pending receipt of Bureau instructions in this regard.

adviced his agency has been in contact with Departmental Attorney, General Crimes Division, who had indicated concerning and under OOJ, Title 18, Section 1505 and 1510, and/or possible violation of Atomic Energy Act (AEA), Title 10, CFR, Part 19.16C.

The Bureau, in reairtel 3/27/75, advised that at the writing of that airtel, no request for investigation received re and .

On 8/8/75, National Labor Relations Board (NLRB), Tulsa, Oklahoma, was contacted regarding status of NLRB investigation concerning KMC. advised that his agency has completed its investigation and found that it appeared that KMC was in violation of the National Labor Relations Act (NLRA), but prosecution against KMC had been deferred in view of the fact that the grievances concerning and are in arbitration procedure under the Federal Mediation and Conciliation Service.

advised that possible NLRA violations on the part of KMC would call for civil action against KMC; however, his agency, as he has previously indicated, does not appear to be pursuing the prosecuting of KMC at this time, but is following the results of the arbitration. advised he is convinced that the Federal Arbitrator will find as his agency did and make a satisfactory settlement against the company and in favor of the employees, and

advised that his agency NLRB has completed an extensive investigative report and he is certain that the results of this investigation could be made available to other Federal Agencies. He does not know this report has been disseminated to the U.S. Department of Justice. A

copy of the report is in his agency's repository at Fort Worth, Texas.

Oklahoma City is of the opinion that no FBI investigation should be conducted at this time relative to captioned matter until results of arbitration regarding and are known, so as not to in any way interfere with the arbitration process.

FEDERAL BUREAU OF INVESTIGATION
COMMUNICATIONS SECTION

AUG 29 1975

020 OC Plain
SENT 1:53 AM 8-29-75 BY JCP FOR
PM MIXED AUGUST 28, 1975 LPS 4 PAGES
DIRECTOR, FBI (117-2701) (NIIEL)
WFO (URGENT)
DALLAS (NITEL)
OM OKLAHOMA CITY (117-54) (P)

EE McGee Nuclear Corporation, Cimarron Facility, Crescent, Oklahoma, AEA; OOJ.

Rebutel Agust 27, 1975.

For information of WFO and Dallas, captioned case relates to labor difficulties stemming from case entitled unsubs; Karen Gay Silkwood (deceased); LMRDA; OOJ. OO: Oklahoma City WFO file 159-369, Dallas File 159-107.

USDJ has requested FBI investigation responsible relations by Kerr McGee nuclear corporation (KMNC) and others of TI8, USC, S 1525, 1510 and 10 CFR section 19.16(c) request made by nuclear regulation commission (WRC) made on section 221 (B) of the atomic energy act (AEA) IA2 eged or suspected criminal violation of AEA.

The oil chemical and atomic workers international union obviously made complaint to WRC, who in turn referred matter to FBI, U.S. Department of Justice, and National Labor Relations Board (NLRB).

Investigation determined that NLRB has completed their investigation re civil action against KMNC concerning Cimarron facility employees and -

were reassigned and fired respectively. NLRB investigation appears to indicate that KMNC is in violation of the National Labor Relation Act (NLRA); However, prosecution against KMNC has been deferred in view of grievances concerning and which are in arbitration through federal mediation and conciliation services.

Byretel, Bureau instructed that investigation immediately instituted re captioned matter and sure promptly. Bureau restructed NLRB report expeditiously secured and furnished to Oklahoma City, who in turn will furnish to department, instructing at WFO be furnished background by teletype and to obtain copy of NLRB investigation from NLRB, Tulsa, Oklahoma, advised his agency's investigation was conducted under case titled "Kerr McGee nuclear corporation, Cimarron Facility, E 16-CA-5935." He believed full file was available through NLRB 16th Regional Office, Room BA24, federal office Building, Ft. Worth, Texas, and could be obtained through regional counsel .

advised NLRB Washington file possibly not as failed at Ft. Worth file; however, any information therein could be obtained through contacting general counsel, 1717 Pennsylvania Northwest, Washington, D.C. . Sugested that initial request for reports and/or sworn affidavits in this case be made to .

For information of bureau, on August 27, 1975, Oklahoma by notified XMNC that investigation was being initiated this matter as requested by USDJ.

WFO at WFO. will expeditiously contact to make arrangements to obtain NLRB reports and affidavits. If detailed information not available through Washington, set out teletype lead for Dallas. In the reports

obtained, furnish same to Oklahoma city for dissemination to bureau and department.

Dallas at Ft. Worth. Information copy by Nitel to Dallas the event it is necessary to obtain requested material through NLRB, Ft. Worth.

Oklahoma city at Oklahoma city, investigation continuing.

Kerr McGee Nuclear Corporation, Cimarron facility, crescent, Oklahoma; AEA; OOJ

RE WFO teletype to director, Oklahoma city and Dallas, August 29, 1975.

On September 2, 1975.

NLRB, Forth Worth, Texas, provided the NLRB file for the Kerr McGee nuclear corporation. Advised the following papers might give the over-all picture of the NLRB investigaion. (1) field investigation report of field examiner dated April 24, 1975; (2) memoraundum from attorney dated July 2, 1975. concerning recommendation – collyer issue"; (3) dismissal mettier to Mr. Anthony Mazzocchi from the NLRB region 16, dated July 8, 1975; (4) statement of - dated 18 Sep; (5) affidavit of dated May 8, 1975; (6) affidavit of dated April 16, 1975; (7) affidavit of dated April 16, 1975; (8) affidavit of - dated April 16, 1975; (9) affidavit of dated April 16, 19756; and (10) affidavit of , dated January 29, 1975.

Advised that a letter to the general counsel of the NLRB Washington, D.C., would be necessary to obtain copies of the above material.

Copies of the above papers should be obtained as there is a large amount of material involved. (P)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Charge Against Employer

FIRST AMENDMENT

Case No. 16-CA-5905
Dated Filed: January 24, 1975

INSTRUCTIONS: *File an original and 4 copies of this charge with NLRB regional director for the region in which the alleged unfar labor practice occurred or is occurring.*

1. Employer against whom charge is brought

a. Name of employer: Kerr-McGee Nuclear Corp., Cimarron Facility

b. Number of workers employed: 150.

c. Address of establishment (Street and number, city, state, and ZIP code): Crescent, Oklahoma 73028.

d. Employer Representative to Contact: Morgan Moore, Plant Mgr.

e. Phone No. 405-232-5471.

f. Type of Establishment (Factory, mine, wholesaler, etc.): Factory

g. Identify Principal Product or Service: Nuclear Fuels

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

(1) Beginning in late December, 1974, and continuing for a period of weeks thereafter, the employer subjected

numerous employees to polygraph examinations during which they were coercively interrogated about (among other things) their union membership, contacts with union representatives, and other union activities.

(2) On or about December 30, 1974, the employer transferred Jack Tice, Chairman of the Local Union, and Jerry Brewer, a former Union Committeeman and an active Union member, from their previously-assigned jobs to jobs in an isolated warehouse, where they were kept under constant surveillance and prohibited from all contact with other employees (except those in the warehouse) even during nonworking time. This action was taken in retaliation for union activities, and, in addition, to prevent these employees from discussing grievances or other union business with other employees.

(3) On or about January 20, 1975, the employer discharged Jerry Brewer, and transferred Jack Tice to an even more undesirable job in the wet end of the ceramic area of the uranium plant. Tice is still prohibited from all access to the plutonium plant, where most of the employees work. These actions were in further retaliation for the union activities of these employees, and the reasons given for Brewer's discharge were pretextual.

By the above and other acts, the above-named employer has interferred with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number): Oil, Chemical and Atomic Workers Int'l Union, AFL-CIO, and its Local 5-283

4a. Address (Street and number, city, State, and ZIP code): 1126 16th Street, N.W., Washington, D.C. 20036.

4b. Telehone No. 223-5770

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)

6. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ Anthony Mazzocchi, Legislative Director
Address: 1126 16th Street, N.W. Washington, D.C. 20036, telephone number 223-5770, January 22, 1975.

Anthony Mazzocchi, Legislative Director
Oil, Chemical and Atomic Workers
1126 16th Street, N.W.
Washington, D.C. 20036

Re: Kerr-McGee Nuclear Corp., Cimarron Facility
Case No. 16-CA-5905

Dear Mr. Mazzocchi:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it does not appear that further proceedings on the charge are warranted at this time. More particularly, the two issues involved in this case (the discharge of Jerry Brewer and the transfer of Jack Tice) were deferred under *Collyer Insulated Wire,* 192 NLRb 837, on July 2, 1975. The discharge of Brewer has been resolved by an arbitrator in favor of Brewer. The issue regarding the transfer of Tice was mutually resolved by the parties prior to submission to an arbitrator. In view of these circumstances and the Charging Party's refusal to withdraw the charge at this time, issuance of a complaint is not warranted. I am, therefore, hereby dismissing the charge in its entirety.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel addressed to the Office of Appeals, National Labor Relations Board, Washington, D.C. 20570, and a *copy with me.* This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D.C., by the close of business on March 22, 1976.

REPORT TO THE SUBCOMMITTEE ON REPORTS, ACCOUNTING, AND MANAGEMENT COMMITTEE ON GOVERNMENT OPERATIONS UNITED STATES SENATE

Federal Investigations Into Certain Health, Safety, Quality Control, And Criminal Allegations At Kerr-McGee Nuclear Corporation

Investigation of alleged harrasment of employees

The Regulatory Commission reviewed the allegations of harrassment of Kerr-McGee employees and found possible criminal aspects to the allegations and therefore referred the matter to the Bureau. (See p. 10.)

The National Labor Relations Board initiated an investigation into the harrassment allegations. This effort was discontinued when the Board recognized it might be concurrently conducting an investigation with the Bureau.

The independence of an ERDA task force

ERDA appointed five members to a task force to examine the quality of Kerr-McGee's product and the effectiveness of the quality assurance program. The task force leader is an FRDA employee; the other members are employed by organizations having contracts with FRDA. (See p. 11.)

GAO found no evidence that the makeup of the task force impaired its objectivity. (See p. 13.)

As agreed with the Subcommittee office, GAO has included a brief summary of the Regulatory Commission and FRDA reports, plus additional information on the Kerr-McGee incidents not directly related to the work GAO was requested to do. (See app I.)

(P. iii of introduction)
May 30, 1875
By the Comptroller General of the United States

All quality assurance and inspection procedures related to Kerr-McGee's fabrication of FFTF fuel. This review included investigations of the union's quality control allegations. A summary of the task force report was made public on April 11, 1975; ERDA plans to release the report itself when it is finalized.

Department of Justice

The chief purposes of the Department of Justice are to enforce the Federal laws, furnish legal counsel in Federal cases, and construe the laws under which other departments act. In addition, the Atomic Energy Act of 1954 provides that the FBI will investigate all alleged or suspected criminal violations of the act. The Department directed the FBI investigate the events surrounding Karen Silkwood's death and the unauthorized removal and possession of special nuclear material from Kerr-McGee. A third investigation, concerning alleged harassment of Kerr-McGee employees, is being considered. None of these investigations has been completed.

National Labor Relations Board

Under terms of the National Labor Relations Act, employees have a right to self-organization, to join a labor organization, and to bargain collectively through representatives of their own choosing. It is therefore an unfair labor practice for an employer to restrain or coerce employees exercising their rights, and the National Labor Relations Board (NLRB) is empowered to investigate any allegation of an unfair labor practice. *NLRB has performed a limited investigation of the alleged harassment of*

Kerr-McGee employees, by the investigation was discontinued when NLRB realized it might be concurrently conducting an investigation with the FBI. NLRB did not wish to jeopardize the FBI investigation.

As agreed with the Subcommittee office, we have included a brief summary of the NRC and ERDA reports, plus some additional information on the Kerr-McGee incidents not directly related to our request (see app. I).

NRC reviewed the union allegations and concluded that Kerr-McGee might have violated Federal regulations, including NRC's regulations. Investigation was deemed to be a matter under the jurisdiction of the FBI, and on February 20, 1975, NRC requested an FBI investigation.

On the basis of *allegations of employee harassment at Kerr-McGee,* which the union submitted to NLRB on January 16, 1975, *an investigation by NLRB was initiated. However, the investigation was discontinued* when NLRB recognized that it might be concurrently conducting an investigation with the FBI. NLRB did go as far as compiling the employee allegations and interviewing seven employees. *NLRB officials told us they do not have additional files on Kerr-McGee Nuclear Corporation at Crescent, Oklahoma.*

As mentioned earlier, the Department of Justice is studying the harassment allegations to determine if the FBI should initiate an investigation.

THE INDEPENDENCE OF AN ERDA TASK FORCE

On December 10, 1974, the Director of RRD appointed five members to a task force to examine the quality of fuel Kerr-McGee was fabricating for FFTF. The task force was to determine the effectiveness of the quality assurance programs at both Kerr-McGee and the Hanford Engineering and Development Laboratory — where the fuel rods that

Kerr-McGee fabricates are sent. In choosing members for the task force, ERDA officials told us the following criteria were used:

– Experience and knowledge in a quality plutonium-bearing fuel, such as FFTF fuel, and in quality assurance techniques.

The task force leader is the Chief, Materials Engineering Branch, RRD. RRD officials told us he was chosen because of his expertise in quality assurance techniques and his supervisor's belief in his objectivity. He has not been involved with FFTF fuel, but he has done some work on other aspects of the FFTF project.

Other members were chosen from private industry or from Government-owned laboratories operated by contractor organizations representing universities, other nonprofit organizations, or private industry. ERDA formulates and administers programs (including allocating funds) carried out by these laboratories. Background information on each member and his employing laboratory follows.

At no time did any contacts I had contact with have any allegations made to me with any specifity. Nor did NLRB or AEC or anyone else single out individuals in particular as harrassment. There were no complaints by any AEC investigators that their investigation was impeded with or interfered with.

I am sure if they had any they would have said so.

Q. Did you ever ask for greater specificity?

A. It was rather an ill defined complaint. I was aware of the fact that the NLRB had conducted rather extensive investigations in fact interviewed considerably more people

than I interviewed. I suggested as I recall that we obtain the results of this investigation and submit it to the U.S. Department of Justice here in Washington for their perusal to see if the inquiry conducted by NLRB up to that point would reflect that there was potential for criminal prosecution against anyone.

I took some time to actually get the results of their investigation, but it is the normal, usual delays that you run into. After an opportunity to review that document, I believe the Department said they wanted to go a little beyond that. I forget how it was stated but we were instructed to proceed.

Q. *Did you find that anyone had been harrassed or complained of being harrassed?*

A. *No one, including the most apparent victims of harrassment, Brewer and Tice.* They would suggest perhaps the administrative action or whatever happened in the firing and reassignment was based on their union activities.

But nothing specific regarding that or nothing specific regarding any interference on the part of the company in regard to AEC investigations.

Q. Regardless of their awareness, of the *three* people who brought a complaint to the AEC in September 1974, *one died,* one was fired, and one was transferred to what was considered an undesirable assignment. Can you explain your finding in view of that?

A. I had the understanding from reading the NLRB report and having some conversations with them that apparently — I forget how they put it, but it is in their report and I am sure you have access to it — that apparently they ruled against the company in favor of Brewer. *I don't think they pursued — I don't think Tice's situation went*

that far and within their agency for some reason which is not clear no me at this time.

They would find the company at fault for unfair labor practices, I guess, they set aside any civil action in favor of arbitration. They would wait until the arbitration results were in before doing any conclusive – there, I understand, if they would disagree with these results, only then would they do anything further.

Interestingly enough, the company was found at fault. It would appear – they were forced to give Brewer back pay, seniority ranking, and so on. *My understanding of the situation is that the company apparently did at one time have valid reasons for terminating Brewer but those were not the reasons indicated to him at the time of termination, but only brought up later.*

If they can't handle a situation like that that would put other legations in proper perspective where they had a legal, fairly uncomplicated situation to dispose of without messing that up.

Q. Did you find any evidence that the company was prounion antiunion?

A. Well, I realize the relative adversary positions that are necessary in this society. They both have their own interests. *It is my impression at that particular facility, they were not necessarily that antiunion. Everyone was getting along pretty well.* It did not take them too long to bargain and so on. There was talk without getting any specifics that the people who had crossed the picket line during previous strike in 1972 were treated more favorably than the people who did not, but *nothing substantial in that regard.*

Q. Did you ever received any complaints of harrassment

from anyone you interviewed in connection with all your investigations?

A. I said no before. I had a minor complaint from Sherri E. when we were trying to get ahold of her. I think that is one term she may have used.

Q. That you were harrassing her?

A. Yes; about trying to interview her. But no one I was interviewing made any complaint that other people from any other source agency, or otherwise were harassing them.

Q. Were you aware of the Kerr-McGee interview with Sherry Ellis?

A. Only in general terms.

Q. What is your understanding of that?

A. As I recall, I set out certain information that I gained early the course of the accident investigation that I obtained in not much detail as a result of that. It is my impression that they would like to keep her on their side during that particular period of time after the contamination incident and after the death. I don't know anything — I am generally aware she was interviewed but I don't know any real specifics of what they said.

Q. Are you aware of the conditions under which she was interviewed?

A. No.

Q. But you consider her testimony or an interview with her crucial?

A. And particularly to the contamination incident. She appeared to be — she was coy in her dealings with me but apparently cooperative.

Q. Can you explain why the company paid her expenses at the motel for a period of time?

A. Yes; I could. They would I think be legally obligated to give her some restitution there. She probably has valid legal acts against them as Silkwood had she been alive at that time. They wiped out, confiscated if you like, all the material, clothing, and so on in her apartment, furniture and every lock, stock, and barrel.

So they had to have a place to stay – she had to have a place to stay. It is reasonable that the company would have to afford her place to stay during that time and also reimburse her for all damages.

Q. On the night when she penetrated the facility, the fence

A. It was the day.

JIM IKARD
Lawyer

March 6, 1978

John Irving, Esq.

General Counsel

National Labor Relations Board

1717 Pennsylvania Ave., N.W.

Washington, D.C. 20006

Dear Mr. Irving:

In January of 1975, Washington representatives of the Oil, Chemical and Atomic Workers International Union filed Complaint No. 16-CA-5905 with the National Labor Relations Board, complaining that members of the Union employed at the Kerr-McGee Nuclear Facility located in Cimarron, Oklahoma, were being harrassed, subject to involuntary lie-detector tests; coersively interrogated about their union membership and union activities; being punitively transferred and fired and being kept under unlawful surveillance by agents of the Kerr-McGee Corporation. (See Attachment #1, affixed hereto)

Over a year later, on March 8, 1976, Mr. Edwin Youngblood, the Director of the Region 16 office of the National Labor Relations Board in which the Kerr-McGee facility at issue is located, wrote a letter to the Washington Office of the O.C.A.W., stating that the Union's January 1975 charges had been thoroughly investigated. He stated in that letter that:

> As a result of the investigation, it does not appear that further proceedings on the charges are warranted at this time.

Mr. Youngblood pointed out that two, of the several, issues complained of by the Union (i.e. the discharge of Union Committeeman Mr. Gerald Brewer and the transfer to an undesirable job of Union Chairman Jack Tice) were "deferred", under the now-partially reversed doctrine of the *Collyer Insulated Wire Case,* 192 N.L.R.B. 837. Mr. Youngblood noted that Mr. Brewer had been re-instated and that "the transfer of Mr. Tice was mutually resolved by the parties".

Mr. Youngblood informed the O.C.A.W. that the "issuance of a complaint is not warranted", even though the Union refused to withdraw its charges of Union harrassment regarding the other 1975 charges filed against Kerr-McGee. Mr. Youngblood thereupon dismissed the Union Complaint filed against Kerr-McGee. (See Attachment #2, affixed hereto)

Thus, despite the unjustified firing of one of the three Union Committeepersons by the Kerr-McGee Corporation and the transfer of a second (indeed the Union Chairman) to an undesirable job assignment due to their Union activities, the Regional Office of the National Labor Relations Board informed the Union that "further proceedings on the charge are unwarranted".

The third Union Committeeperson who had been subjected to harrassment and unlawful surveillance, Ms. Karen Silkwood, filed suit against the Kerr-McGee Corporation in 1976, charging agents of the Kerr-McGee Corporation with violations of the federal Civil Rights Act. (See Complaint filed in the United States District Court for the Western District of Oklahoma on November 5, 1976)

In response to these charges, the Kerr-McGee Corporation, and the Justice Department, filed Motions to Dismiss

the Complaint – asserting that the National Labor Relations Board "had exclusive jurisdiction over the matters complained of" in the Complaint. (See Motions to Dismiss filed with the United States District Court for the Western District of Oklahoma on December 23, 1977)

In discovery on these matters, the Kerr-McGee Corporation and the Justice Department informed attorneys for the Plaintiff Karen Silkwood that investigators for the National Labor Relations Board had come to no conclusion with respect to the charges of harrassment and surveillance filed by the Union, but that, prior to any such determination "had turned the investigation over to the F.B.I., as soon as the N.L.R.B. investigators determined that there might be criminal violations of the National Labor Relations Act".

In light of this assertion, the Plaintiff in *Karen Silkwood* v. *The Kerr-McGee Corporation, et al.,* No. CIV-76-0888-Theis, took the legal position that whatever initial jurisdiction the N.L.R.B. had over the investigation of this matter was irrelevant – since the N.L.R.B. investigators had ceased their investigation before coming to any substantive conclusion on the merits of the charges made.

The F.B.I. refused to produce, during discovery proceedings – which terminated on December 1, 1977 – any of its communications on this matter with the N.L.R.B.

However, after the Plaintiffs had set forth the above-described rejoinder to the Justice Department position, and after the Trial Judge sitting on the *Silkwood Case* on February 16, 1978, directed the F.B.I. to hand over additional information to the Plaintiff in this case, the Plaintiff received, on February 20, 1978 Xerox copies of certain 1975 "Airtels" from the F.B.I. specifically stating – (con-

trary to the information revealed by the F.B.I. during discovery) – that

> On 8/8/75, _____ National Labor Relations Board (N.L.R.B.), Tulsa, Oklahoma, was contacted regarding status of N.L.R.B. investigation concerning KMC _____ advised that his agency has completed its investigation and found that it appeared that KMC was in violation of the National Labor Relations Act (N.L.R.A.), but prosecution against KMC had been deferred in view of the fact that the grievances concerning _____ and _____ are in arbitration procedure under the Federal Mediation and Conciliation Service.
>
> _____ advised that possible N.L.R.A violations on the part of KMC would call for civil action against KMC; however his agency, as he has previously indicated, does not appear to be pursuing the prosecuting of KMC at this time . . .
>
> _____ advised that his agency has completed an extensive investigative report and is certain that the results of this investigation could be made available to other Federal Agencies. He does not know if this report has been disseminated to the U.S. Department of Justice. A copy of this report is in his agency's repository at Ft. Worth, Texas.
>
> Oklahoma City (F.B.I.) is of the opinion that no F.B.I. investigation should be conducted at this time relative to captioned matter until results of arbitration regarding _____ and

> _____ are known, so as not to interfere with the arbitration process. (See F.B.I. Airtel OC-117-54, page 1, affixed hereto as Attachment #3)

This F.B.I. Airtel goes on to state:

> It is noted that N.L.R.B. considers it has substantiated a civil violation of the N.L.R.A. on the part of KMC, and has conducted extensive investigation in this regard. Any investigation conducted by the F.B.I., Oklahoma City would be duplicative of N.L.R.B. investigation.
>
> It is requested that the Department be contacted and determine if the criminal Division of the U.S. Department of Justice has had an opportunity to review the N.L.R.B. investigation and, if so, whether or not a review of this investigation suggests a criminal violation of Title 18 U.S. Code Sections 1505 and 1510 and 10 CFR Section 19.16(c) and, if so, whether or not the Department would entertain prosecution against KMC in this regard.
>
> It is further requested that it be determined whether or not F.B.I. investigation at this time is warranted in view of current arbitration regarding _____ and _____ . . . Oklahoma City (F.B.I.) is holding investigation in beyance pending receipt of Bureau instructions in this regard. (See F.B.I. Airtel OC-117-54, page 2, affixed hereto as Attachment #4)

That a Justice Department review of this N.L.R.B. file *did* "suggest a criminal violation" is strongly evidenced by F.B.I. Washington's August 29, 1975 Teletype cable

(OC-117-2701) from the Director of the F.B.I. to the Dallas and Oklahoma City offices of the F.B.I. stating that

> USDJ has requested F.B.I. investigation re possible violations by Kerr McGee Nuclear Corporation (KMNC) and others of TI 18, USC, S 1505, 1510 and CFR Section 19.16(c) and request made by Nuclear Regulatory Commission (NCR) made under Section 221(B) of Atomic Energy Act (AEA), S 2271(B), which provides that F.B.I. shall investigate suspected criminal violation of AEA. (See OC-117-2701 affixed hereto as Attachment #5)

Further F.B.I. cables revealed that the N.L.R.B. investigative file at issue is designated "Kerr McGee Nuclear Corporation, Cimarron Facility – E 16-CA-5905", and that the full investigative file is kept in Room 8A24 of the Federal Office Building in Ft. Worth, Texas at the 16th Regional Office of the National Labor Relations Board.

In light of the manifestly conflicting positions taken by the Justice Department during discovery in our case (first asserting that the N.L.R.B. investigators had come to *no* conclusion concerning the merits of the January 1975 charges of Union harrassment filed against Kerr-McGee by the O.C.A.W. before turning the investigation over to the F.B.I., and later asserting that the N.L.R.B. "had completed its investigation into the charges" and "had substantiated a civil violation of hte N.L.R.A. on the part of KMC" declaring that "any investigation conducted by the F.B.I. would be duplicative of the N.L.R.B. investigation) I am submitting the following requests to the Office of General Counsel for the National Labor Relations Board under Rule 118 of the N.L.R.B.'s Rules.

Could you please simply review Case #E 16-CA-5905 and *inform us (not* supply us with copies of any affidavits or other materials) as to which of these two sworn positions of the F.B.I. is true? Did N.L.R.B. investigators conduct a full and complete investigation into the January 1975 Complaint filed by the Oil, Chemical and Atomic Workers' Union and substantive that Kerr-McGee was guilty of civil violations of the N.L.R.A.? Or did N.L.R.B. inspectors call off their investigation of the charges and turn the investigation over to the F.B.I. when it began to appear that violations of the criminal law might have been committed?

It is my understanding from my March 1, 1978 conversations with Mr. Jerome Avedon, the Regional Attorney for Region 16 of the N.L.R.B., that your Office of General Counsel has the authority to comply with my request for an answer to this narrowly-crafted question submitted to you under Rule 118 of your Board Rules.

In light of the position taken by the F.B.I. on this issue during the year of discovery, the Plaintiff did not exercise its subpoena power to attempt to obtain copies of Case File #E 16-CA-5905, because we were told that it contained nothing of any substantive value. Now, as of December 1, 1977, discovery in this case has been closed by order of the Court. The Plaintiff does not, therefore, possess subpoena power to obtain this information from your Board on any basis other than on a voluntary basis.

The F.B.I. position maintained until after the closing of discovery, however, could give rise to extreme difficulties for the Agents and F.B.I. attorneys responsible for this mis-informaion — if it results in our being denied the information we are now requesting.

We would, therefore, appreciate your *voluntary* cooperation in this matter, so as to avoid the need to raise extremely serious questiosn of government misconduct to the Court against the Bureau and their attorneys in this matter, in order to be granted the renewed authority to issue subpoenas for the material requested.

I have discussed this matter with Mr. John Valcone in your office, and he suggested that this formal Rule 118 request would give your office the maximum opportunity to exercise its discretion in answering this question without the need of raising unnecessary questions in this matter.

Thanking you for any assistance you might be able to provide in response to my request, I remain

Most sincerely yours,

/s/ Daniel P. Sheehan, Esq.
Daniel P. Sheehan, Esq.
Attorney for Karen Silkwood
Civil Matter No. CIV-76-0888-Theis
United States District Court for
the Western District of Oklahoma

DPS:pa

Attachments

JIM IKARD
Lawyer

Feb. 21, 1978

Mr. Edwin Youngblood, Regional Director
National Labor Relations Board
Region 16
8A24 Federal Office Bld.
819 Taylor St.
Fort Worth, Texas 76102

Dear Mr. Youngblood,

I am writing in regards to a phone conversation my Chief Investigator had with your Tulsa Res/Off Bill Cates this morning. Mr. Cates refered our inquiry to your office of your NLRB File %16-Ca-5905.

We are in possession of FBI File #117-2701 which concerns your investigation of the above mentioned case.

I am requesting a copy of your investigation regarding this matter through the Freedom Of Information Act.

Please reply at your earliest convenience.

Sincerely yours,

/s/ JIM IKARD, Esq.

Exhibit #11

Sworn Deposition of Non-Party John H. Taylor Explaining the Nature of the Illegal Dossiers And Intelligence Files Kept by Private Nuclear Corporations on Their Workers, The Telephone Monitoring Done and Other Illegal Activities Undertaken by Security Personnel at Such Facilities

and

Investigative Report Citing Discussions With William Lovin In Which Details Were Given To The Plaintiffs Describing There Activities And the Participation In Them of Local Police Intelligence Units and L.E.I.U. Representatives

SWORN STATEMENT

OF

JOHN H TAYLOR

taken at

Route 1, Macon, Georgia

September 23, 1977

7:30 P. M.

APPEARANCES:

MR. JOHN M. VANSANT, JR.
Vansant & Engram
100 North Madison Street
Albany, Georgia 31701.

Reported by:

Ms. Paula F. Childre
Claude Joiner Reporting Service
520 American Federal Building
Macon, Georgia. 31201.

MR. VANSANT: This is a statement given by MR. JOHN H. TAYLOR under oath on September 23, 1977 at approximately 7:30 P. M. given at the home of Mr. William D. Lovein at Route 1, Box 600, Macon, Georgia. Present are Mr. John II. Taylor, Mr. William D. Lovein, Larry W. Thomason, Esq. of Decatur, Georgia and John M. Vansant, Jr., Esq. of Albany, Georgia. Conducting the examination of Mr. Taylor are Mr. Thomason and Mr. Vansant.

SWORN STATEMENT

of

JOHN H. TAYLOR

QUESTIONED BY MR. VANSANT:

Q For the record, would you state your full name?

A John H. Taylor.

Q Where do you reside, Mr. Taylor?

A 589 Charing Cross Drive; Marietta.

Q What is your employment?

A Where?

Q Well, where is your employment?

A I'm employed by Georgia Power presently, physically, located in Forest Park.

Q What are your functions with Georgia Power?

A At the present time, I'm told to conduct a study of the current diversion program to determine the feasibility of consolidating that program and making it a more effective state-wide program.

Q How long have you been performing that function for Georgia Power?

A I moved into my present office yesterday.

Q What did you do for Georgia Power prior to that time?

A I was - right prior to that I was called a security specialist.

Q How long were you so employed in that capacity at Georgia Power?

A Since March of '76 and prior to that I was - the title was physical security supervisor which was about a year before that. Prior to that would have been a field security investigator.

Q Field security investigator?

A (WITNESS NODDED IN THE AFFIRMATIVE)

Q When did that capacity commence with Georgia Power?

A When I was hired.

Q And you were hired on what date?

A Well, that's not correct. It was not when I was hired. I was hired into the claim department as a claim investigator, but I was hired with the understanding that I would be dealing with security matters since they did not have a security department.

Q When was that?

A That was in October of 1972.

Q October, 1972?

A I believe.

A I was officially termed a claims investigator.

Q Now this was before the creation of the security division, is that correct?

A That's correct.

Q How long did you operate as a claims investigator – from October of 1972 until what date?

A Until about June of '73 when the security department became a department.

Q They call it the security department?

A Yes.

Q Tell us about the creation of the security department in June of 1973. Who was placed in charge of that security department and who were the people working in it and what were the divisions within that department, et cetera?

A When I became employed with the power company, I was not aware that there was a study for a security department to come into existence, although I was hired to conduct security related matters, because the claim department was sort of responsible for those. After I was employed, I found out that Wyman Lamb was apparently assigned the responsibility of conducting a feasibility study to see if Georgia Power, in fact, needed and could warrant a security department. His study was given to management and, I believe, effective June of '73 the department became a department.

Q Was Wyman Lamb placed at the head of that department?

A He was the manager of the department.

Q Were there any internal divisions within that department?

A Not at that time, although the study indicated it would be broken down into two areas; one dealing with investigations and one dealing with the physical security aspect of the department.

Q Now the investigations would be plainclothes and the physical department would be the uniformed.

A. Generally, yes. The investigations more commonly would be referred to people that - investigators that would investigate any crimes directed against the company or within the company; things of this nature, but it would be plainclothes type business.

Q When the department was created in June, 1973 how many employees, approximately, did the department have?
in they had Alabama Power typed at the heding and Alabama was simply erased and Georgia was put in its place.

Q Do you recall the approximate date that this classification was prepared and circulated?

A It would have been in June of 1973 when the department became a department.

Q Looking at some of these classifications - looking at Item 20 on this classification, the Criminal Intelligence, exactly what was encompassed in that category and was there much activity in that area?

A These Criminal Intelligence - a description indicates that they were information on individuals or organizations whose activity would present a threat to company operations.

Q Was there much activity in that area?

A Initially there was. I can't positively say it went into the 20 category, but I know that there was a lot of activity in this intelligence area.

Q Looking at 21, the Management Request for Investigation outside Georgia Power Company, do you recall exactly what was encompassed in that category? Can

you give me any specific instances when that particular category would have been invoked by the need for some type of investigation?

A I don't recall working any of those. I may have worked some leads on a case in that, but I do know from the previous records that there were cases conducted in that category and they could be - any management person- could request an investigation of anything and, normally, the investigation would be performed.

Q No questions asked?

A I can't say that. I wasn't, you know, the one they talked with. . .

Q Right.

A . . .but I know there were a number of investigations conducted there.

Q Can you remember any specific investigations the facts that were involved?

A I recall from the latest news article and subsequent conversations with people that there were a lot of investigations requested by Mr. Minors.

Q A Mr. Minors?

A Charlie Minors.

Q Would this have been investigations on individuals not connected with Georgia Power?

A Yes.

Q Would this have encompassed those individual files that were eluded to in the article by Mr. Christensen and Baxter concerning individuals or certain groups who were . . .

A Yes.

Q . . .whose activities were looked into because they might have interests contrary to those of Georgia Power?

A Well, there are certain intelligence files that, I think, would possibly be more directly concerned with people who were antagonistic to the company, whereas these investigations under 21, might not be anyone antagonistic. It might be just a request for general information.

Q Looking at this classification sheet, what category listed in the classification would have related to those individuals whose ideas or activities were antagonistic to Georgia Power? What heading here would be invoked?

A I'd say they could fall into either category, but I would tend to put them more n number 20.

Q Number 20, Criminal Intelligence.

A Yes.

Q Do you recall the names of any specific individuals who were investigated under either section 20 or under section 21?

A I can't say that I recall any individuals that were investigated. I do recall a number of individuals whose names were indicated in the files.

Q Through an index and through an actual file maintained; a filing system?

A That's correct.

Q Who were some of the individuals, please?

A Mr. Thomason was one name that I recall being on the index cards.

Q Did you ever see his actual file?

A I never saw a file per se that was labeled with his name. I have seen the index files whereas his name was indexed implying that his name would be in the files.

Q Generally, what type of matters were kept in these files? Would there be newspaper clippings, credit reports?

Q What were some of the things?

A Generally, an intelligence file, from what I was able to see, would contain - it would be more for an organization than for an individual, although there could very well have some individuals. I know that there was some concerned expressed toward individuals within organizations. For example, Mr. Geurro and his association with the power project. As far as individual files that have a name on it, again, I can't recall every having seen one of those.

Q Except for Mr. Thomason?

A No. I said I saw his name indexed on the index cards which means that his name would be in these - it could be in any number of files wherever they elected to put it, because the index cards would show - it would have a person's name and then it'll have the case where his name would show up. He could show up in any number.

Q In vandalism, or the nut file or the drug abuse file. Your knowledge of his name having been placed on an index card reveals nothing but that there was a file or you don't know which category his file fell under, is that right?

A I don't want to call his a file. I think we need to determine that. His name would be included in a folder, a file folder, with possibly other names. I don't recall his name being a file by itself.

Q All you know then is that there was an index card reflecting his name.

A Yes. I know at the time, as indicated in some of the newspaper articles, this period of conflict or whatever it was referred to, that his name did surface quite often by Mr. Lamb and Mr. Benson.

Q Do you recall any specific statements made about Mr. Thomason that would reflect their concern over him?

A I don't recall per se any statements; just the general mood being that he seemed to represent or be involved with activities that could be considered antagonistic to the power company at that time.

Q And you've stated that his name was mentioned in connection with conversations that you had with Mr. Lamb and who else?

A Mr. Benson.

Q Mr. Benson. On numerous occasions?

A Yes, I would say several occasions his name was mentioned. I may not have had the conversation with them. I may have - sometimes I would have been involved in the conversation; sometime I just would have been a party to the conversation.

Q In other words, you might have been a participant of the conversation or just overhearing this conversation.

A Right.

Q Do you know, approximately, the dates we're talking about in connection with these conversations?

A Most of this would have occurred in the calendar year of '74, I believe.

Q Do you remember the general context in which his name was mentioned other than the fact that he might be a part of activities that were antagonistic to Georgia Power's interest; anything specific as to whether it involved rate increases or . . .

A I can't - at this moment, I can't recall any specific conversation except the fact that the mood was that, you know, this gentleman represents factions that we'd rather not have bothering us.

Q Do you recall the mention of any other names besides Mr. Thomason in that same general veing?

A Well, I mentioned Gene Geurro.

Q Now this instructional manual that was prepared by Mr. Duff, do you know of one that's in existence and available to you now?

A After having moved, I'm not sure that I would have access to one.

Q You don't have one already or know of one in existence that you could lay your hands on outside of Georgia Powe?

A I may have one, but that would be just a pure guess.

Q Was there anything in the manual concerning the type of activities to be investigated or the things that should be important with regard to any of these people being investigated?

A No, I don't recall that. It was, basically, just an instructional booklet as to proper procedures for report writing and then file indexing from that report.

Q I believe various officials for Georgia Power in the last few weeks have indicated that these files that were

maintained on individuals consisted, primarily, of just a series of newspaper clippings. Can you substantiate that or do you contradict that?

A I don't recall ever seeing a file that contained only newspaper clippings, although a lot of files would probably contain some newspaper clippings, but they would in all probability be related to some activity or some documentation already existing in the files or something that was coming shortly.

Q Who had access to these files?

A The files would have been maintained by the clerical people and, during the initial stages of the department, Joyce Leach and Jeanie Barfield would have been principally involved with their maintenance.

Q Were these files accessible to any of the investigators; any of the management or supervisory people within physical security division?

A Well, there would really be no reason, or generally there would be no reason, for someone aside from an investigator to have access, direct access, to them other than looking over someone's shoulder or seeing the girls filing or something like that.

Q Could you have gone in at any time and told Ms. Leach or Ms. Barfield that you wanted to see the file on Larry Thomason?

A Oh, yes; you could ask for any file, yes, and could get it.

Q Who all could do that?

A Everybody within the department could. There was no - well, no, I'll back up. On files maintained within the file room per se, to my knowledge, anybody that would request it could have it. Now there were, I felt, some files that were kept that were not commonly referenced and would not have been openly disseminated to people within the department.

Q What would those files have been? Why would they have been different?

A Well, I recall one occurrence where Ms. Barfield was xeroxing a roster of the members of the John Birch Society Things of that nature, unless, you know, you had a reason to, they would not be offered to you.

Q Any other group other than the John Birch Society or any other individual and do you know the reason for that?

A It was part of an intelligence gathering scheme, in my opinion.

Q Who would those files be restricted to? Certainly, there would be some individual.

A Generally speaking, Mr. Benson was the person at that point in time that was really involved in procuring the intelligence type information and its ultimate filing.

Q And so whether or not there was wide dissemination of a particular file or whether it was severely restricted would depend on Benson or Lamb?

A For the most part I feel like it would. They had certain - see, at that point in time, again to go back to the mood of the department, Mr. Benson was very involved in the

Q Do you recall seeing any of the news media files on

any news media personality — David Morrison with the Constitution and Jim Hightower with the Journal?

A I don't recall seeing those. There was a person that was in the news media that was employed in the public information department, Jackson Baine. There was an investigation, or a form of an investigation, conducted at the request of the manager of that department, as I recall.

Q And he was with Channel 5?

A He went - I think after he left the company, he went with a TV station.

MR. THOMASON: He went with Channel 5 and then he went with NBC News where he is now.

A The Witness: He was previously with an outfit in Temple, Texas.

Q Well, the file was maintained on Mr. Baine at the time that he was still with the company, Georgia Power.

A That's correct. There was an allegation, an expense account allegation, against him.

Q That he had misused his expense account?

A As I recall, that's correct.

Q What category would the employee's files be maintained under; misues of expense accounts, misappropriation of company property or just disloyal acts in general? Would there have been a separate category under the classification sheet that's marked Exhibit A for that type activity?

A For an expense account type. . .

Q Anything involving misconduct on the part of employees.

A It depends. It could fall under a conflict of interest and, if they were like involved in the losses of fuel supplies, it could fall under that category. It tended to fall under the category of which they were principally involved with. If they were stealing copper, it would fall into copper losses; things of that area.

Q Well, let me ask you this. If ever there was a copper loss or there was a theft of some type good, would files automatically be created on the individuals who were closest to that situation whether there was really any suspicion or probable cause with regard to that individual?

A If the person was involved in any way with the investigation, he would have been included in the investigative summary.

Q Whether or not he is exonerated or where the suspicion is. . .

A He's a suspect or a witness. At that point in time you may not know what he was. It would just be entered and the closing summary would supposedly tell what evolved during the process of the investigation.

Q Do you know whether or not as regard to these files kept on individuals who held views or conducted themselves in a way that was antagonistic to Georgia Power Company's interest, do you know whether or not credit reports were ever placed in those files on those individuals?

A I can't positively say they were. I do recall and I believe Fred Lindstrom was the person that was obtaining some credit reports on people that may not have been company employees.

Q Where would he get these credit reports, do you know?

A What firm would he get them from?

Q Yes.

A At that time it would have been Retail Credit.

Q And Retail Credit was furnishing him reports upon his request?

A It was a request through a department account.

Q Through a department account? What do you mean by 'a department account'? Would it be a bank account?

A As a process of reviewing applicants for the security guard force, one of the requirements was to conduct a background investigation of which a part of that would be a credit check. So because of that, we had an acount with Retail Credit. In other words, we would send them names of people under this account. They would bill us from that account. That would have - could have been. I suspect it would have been the manner in which it was done.

Q And Lindstrom was the person who gathered all the credit information on individuals?

A No, I don't say that he gather all of the credit information. I recall a particular period of time where he was involved in getting some information and the reason that I recall that is because the bill came - most of those bills came through me because they dealt with the security officers. Some of these I was not familiar with but as I recall, I think I gave those back to Joyce and asked her to talk to Fred because, I think, Fred was the person who conducted these.

Q When the bills were received from Retail Credit,

would it specify the individual for whom the credit report was obtained?

A The person for whom it was obtained?

Q Yes.

A Yes.

Q And you recall in certain instances where names would be included in these billings that were not employees.

A I can recall some that I was certainly not familiar with. They were entirely divorced from my area of activity and, as I understand, they were not employees.

Q Now I think you've indicated that Lindstrom - well, primarily, not necessarily to the exclusion of others, but primarily was involved in obtaining credit reports. Were there other individuals within the investigative section who were vested with responsibility in a specific area like credit reports? How about drug use, sexual habits; things of that nature?

A Anybody could ask for a credit report. The only reason I recall that particular instance with Lindstrom, again, was because I had to direct those invoices through Joyce to him, but anybody within the department could have requested that. Normally, what they would do is just go up to one of the clerical girls and say I want a credit report on this person and give her that information. She would enter that on the forms that they requested it on.

Q What happened to those bills that came in from Retail Credit that contained the names of the persons for whom charges were incurred in obtaining credit reports?

A They would have been forwarded through accounting for payment.

Q What would accounting have done with them? Do they microfilm the, photostat them?

A I don't know. I need to interject – at one point, there was a file with the credit bureau. I think there is a difference between a credit bureau and Retail Credit. . .

Q Yes.

A . . .where you could call in a person and give them you code and you could get that information over the phone. That was done for a short period of time but then that business was totally curtailed. Why, I don't know. Those bills, again, would come forward and somebody would have applied an account number and authorized payment.

Q Well, even when you made the - the request was made over the telephone for a credit report, wouldn't it automatically follow that a written report would come in the mail afte' that?

A Not necessarily.

Q Did Retail Credit furnish written reports?

A I think if you requested it. Basically, see, that was done principally for the immediate information at that point in time.

Q Right, Well ow, you're familiar with the fact that you can get - or are you familiar with the fact that you can get two different types of credit reports; one that they call an Investigative Credit Report and the other Consumer Credit Report.

A Yes.

Q Were you all obtaining the Consumer Credit Reports which would just have been a credit approval given over

the telephone or were you getting the investigative reports which would have given certain information regarding the living habits, personal habits, of the person; the type of reports that insurance companies ordinarily obtain on an individual upon request for a life insurance policy?

A I don't recall ever requesting any of those latter ones and I don't recall ever seeing any of those.

Q You're stating that it's your opinion that whatever type of credit report was requested by Lindstrom or whoever was just a consumer type credit report and it related to employment.

A No. What I'm saying is that the only thing I can say for sure is the things I was involved with and that was the security officers and those were just a very limited report.

Q Why would you obtain them in the first place? Did you just not want any employees with bad credit?

A Not really because we were obligated to the Nuclear Regulatory Commission to conduct them.

Q This was a requirement.

A A requirement and all it was - and, basically, the information we got was useless, but we could say to them 'well, we've done this'.

Q I see. So this was a requirement imposed on you by your regulatory body.

A Yes.

Q Do you know of any instance where either your internal security division or a contract firm conducted examinations or investigations of employees or outsiders concerning their sexual or drug habits?

A I'm not aware of any actual investigations dealing with those areas.

Q Are you familiar with a company called Sentinel Security Company?

A Sentinel Security.

Q Sentinel out of Dallas, Texas.

A Yes.

Q Do you know the nature of the contract that was let by Georgia Power with them?

A There were two different categories of contracts that I'm aware of that was given to them; one dealt with providing a contract security coverage for about a forty-five or fifty day period at Plant Wansley during a transition from another contract service to a company force, and another dealth with some type of undercover investigation at Plant Bowen and I'm sure also at Plant Wansley.

Q What specific functions were performed by Sentinel Security at those two plant locations? Was this physical security?

A The first area that I talked about was strictly physical security. The second part with the undercover, as I recall, dealt with some type of drug abuse problem they had at both locations.

Q Those were the only two contracts that you're aware of that Georgia Power ever gave to Sentinel Security.

A Yes.

Q Who prepared the budget for the security division?

A I did.

Q Exactly how was the budget broken down? Do you remember the lined items or the basis lined items that went into the preparation of the budget?

A Initially, I think we had only two categories to concern ourselves with; that was wages and the other one was meals, traveling expenses and then in a short period, within months, we were given an additional category. Right now we budget for wages and salaries. We budget for the meals, traveling expenses; expense account items. We also budget for office supplies and equipment.

Q Do any of those categories lend themselves for disguise? Is there any particular category that was used to disguise payments?

A Well, the latter two could be used in many, many ways.

Q Do you know of any specific instances where payments were made out of one budget item for non-lined items? In other words, payments given to outsiders for activities related to the security division. Specifically, I refer to Reese. What's his first name?

A You're talking about John Reese.

Q John Reese.

A I don't recall having seen the actual transfer of paper, whether it be money or checks, but I would think that at that point in time he would have been paid out of a petty cash area which would be later applied to the office supplies and equipment. That's not as a means of subterfuge in itself because we were told that we were to budget everything into these three categories. Salaries, of course, is pretty easy. Expense statements is pretty easy. The last one was a catch-all. Everything that didn't fall into the

first two categories automatically went into the third category.

Q Who directed you in your budget preparation? Who were you answerable to?

A Initially, Wyman; Wyman Lamb.

Q Who subsequently?

A Art Benson.

Q Are you familiar with any illegal campaign contributions that might have been made by employees of Georgia Power to any politicians?

A Not directly or first-hand, no, I don't.

Q Do you have any first-hand knowledge of the destruction of the files that were maintained on individuals which were publicly announced as having been destroyed by officials of Georgia Power Company in the last few weeks?

A I don't have any first-hand knowledge of their destruction. I do recall about the time in 1974 when Mr. Benson was being questioned about these activities that. . .

Q That was in the deposition taken by Mr. Friedman and Mr. Benson?

A That's correct, the latter part of 1974.

Q All right.

A I do recall Mr. Benson coming out of the office with a couple of cardboard boxes containing files and the statements were made that these were being taken out of the office because they were afraid of being served with a subpoena.

Q And this was after - no, this was prior to his subpoena actually having been served on Mr. Benson?

A I was not aware that - the documents themselves would be subpoenaed is what I'm talking about. I think this happened after, although I'm not positive, but I think this happened after he was subpoenaed for his deposition.

Q In his subpoena compelling him to personally appear, were the documents also subpoenaed? What we call a subpoena duces tecum; that he was charged to produce certain documents when he appeared?

A I'm not. . .

Q You didn't see the subpoena served?

A No.

Q But Mr. Benson was removing certain files from Georgia Power Company stating that he wanted to avoid their falling into the hands of Mr. Freeman in response to his subpoena.

A As I recall, the conversations were in general that we were removing these documents from the office because there were comments to the fact that 'isn't it amazing how these things became lost all of a sudden when a subpoena would arise'.

Q Do you remember the nature of the documents that were removed? Were they all files maintained on individuals or . . .

A They were all files that - although I never saw the files, I saw the boxes and the documents that were in them which contained files and file folders. The drift of the conversations at that time were that these were intelligence type files.

Q Which would have been maintained on individuals and groups.

A Yes.

Q Individuals and groups that Benson deemed were antagonistic to Georgia Power Company.

A Yes.

Q Were you familiar with the electronic equipment that was used by the security division to conduct surveillance on individuals?

A I'm familiar with some of it.

Q Well, what type of equipment are you familiar with that was used?

A Aside from photographic equipment, I don't recall any as having been used in one of our investigations. There was a lot of equipment there, but I don't recall it having ever been used.

Q Was there any electronic eavesdropping equipment?

A There was some there, yes. A lot of that was fabricated by Mike Metter in the communications department that was given to Mr. Benson. As I recall, from the point from the time it was given to him, I don't think I saw much of it after that.

Q Can you describe what type of electronic eavesdropping equipment you did observe there?

A These items were related to telephone monitoring.

Q Telephone monitoring?

A (WITNESS NODDED IN THE AFFIRMATIVE)

Q Do you know of their specific use?

A I never saw them used, no.

Q Now let me ask you about the warrant that you took out against George Davis. Who is George Davis, first of all? Identify him.

in category?

A Repeat your question.

Q Okay. Insofar as your work goes, your knowledge or even what you know about, are there one or several security accounts that could be found?

A Okay, I. . .

Q I'm not an accountant and it's hard for me to ask those question.

A Well, neither am I and it's hard for me to understand them sometimes. The only thing that I budget for, or the only thing that I was requested to budget for, were those expenses that were directly affiliated with the department, with the staff, with that office out at 6 LaVista; those people assigned directly to that. At each area, at each location where there are company security forces, of course, that costs money. Those costs are applied toward or against account numbers for those respective locations.

Q That's what I was getting at. So the audit would have to go even further than just you.

A That's correct.

Q In other words, that's a big undertaking. It's no small job for an auditor at all.

A Precisely.

MR. VANSANT: Well, who are the other individuals besides yourself that the auditor would have to reach? Who are the other people similarly situated?

A The Witness: See, it gets a little confusing when you get out of our office because I'm not aware of any budget, security budget, that's made up - a single security budget that's made up that includes all of those expenses that are applied to these various locations where security forces are located. All of this again were given account numbers for this location or that location. When something is applied toward that, it's merely entered on there and it's forwarded to accounting and then that account number, that costs, is applied against that account number.

Q Mr. Thomason: On the non-uniformed activities non-plant related, forgetting the security of a sub-station or a plant or a construction project, your budget should encompass most everything else, shouldn't it? It should be accounted for in your office. . .

A I think so, yes.

Q . . .as far as the Atlanta operation.

A Again, you have to look at it, I think, as those activities that are either originating or at least being directed from that physical location and it's generally those people that are assigned to that physical location.

Q Can you recall your last operating budget that you supervised, the dollar amount of it?

A Roughly, $700,000 I believe.

MR. VANSANT: How much of that went into the stationery account?

A The Witness: I don't remember.

Q Mr. Thomason: I ascertained this afternoon that Georgia Power reported to the Federal Power Commission on their FPC Form 1 for fiscal year 1976 an expen-

diture of over $100,000 to Sentinel Security. Do you have any idea what that would be for?

The only knowledge - direct knowledge that I have of any work they performed were those I previously indicated where they had a contract service for about - it couldn't have been much - if it was sixty days, it couldn't have been much over that. That wouldn't have been - couldn't have been very much and then those other two locations dealing with drug abuse cases.

Q During that year of fiscal '76 can you recall any major security scares, such as threats of a Manson-type group or radicals or militants that would have justified Sentinel's activities in Georgia for $100,000?

A The only thing that comes to mind was this B.A. Fox letter affair, extortion letters that, I think, surfaced at that time, but I don't - and there were, maybe, there were some threats made against some west coast executives. I can't recall anything that - I can't visualize how $100,000 - that's a lot of security.

MR. VANSANT: And you don't know of any actual security provided that would match that value, do you?

The Witness: Not that I'm aware of. Those areas that I gave you are the only ones that I'm aware of. I do know, of course, Mr. Agee was in the office. At the time that he was in Atlanta, he was in and out pretty often.

A. I don't know what his current position is. I know that he's in Dallas. At that time he was the manager of the Atlanta area.

Q Going back to the evening of September the 9th, subject to check if you'll assume my veracity on this, are you familiar with Terry Leedom?

A I know who he is, yes.

Q The public relations spokesman for Georgia Power at their downtown Atlanta office. On that evening, Mr. Leedom supplied WAGA-TV in Atlanta and United Press International with what I'll paraphrase as being the following statement – that there were some files kept on individuals; that if these files did not involve criminal activities the individuals could see these files. Are you familiar with any procedure or practice like that that your office ever maintained, any format for individuals to be able to see their files?

A I'm not aware of any instance where they've offered the files to individuals, particularly, if people were considered a subject of an investigation. I don't know of any cases.

Q Does that statement surprise you in any way? Does it seem a little. . .

A It's contrary to normal policy within the department.

Q. On the next day, on September the 10th. Mr. Leedom told the Atlanta Journal that any files they had on individuals had been destroyed. Are you familiar with any destruction of files by Georgia Power?

A No, not of any actual destruction. I was told by one of the people within the department that late the evening -late that Friday evening. . .

Q September the 9th?

A The day the story was written in the paper that well, he was out late that evening and over the car radio, he heard Mr. Benson calling Mr. Twedell and Mr. Jackson. The comment was made - he made a comment jokingly to me was 'I guess they were out destroying the files'. That wouldn't surprise me, but that's the conversation.

Q In Mr. Benson's deposition that Roger Friedman took, Mr. Benson made the statement that security files were used in this manner – that they would supply information to authorities and they also received information from authorities, referring to the police and the like; federal and state and county police authorities. Has there ever been an instance, and I don't care to go into any particulars about this, but has there ever been an instance where a police authority supplied information to the security unit?

A Off the top of my head I don't recall any written documentation, but of course, during normal liaison and the rapport that would be developed from that, there is a verbal exchange.

Q Mr. Lamb, also in that same deposition, was indicated - was identified by Mr. Benson as being a very active member of the DeKalb County Republican party. At one time, he appeared to hold an office in that.

A Who did?

Q I mean Mr. Lamb.

A Yes.

Q Wyman Lamb.

A Yes.

Q Do you recall any index cards or case numbers or loose talk or anything concerning anyone of any political prominence at that time, forgetting me and others we've talked about.

A Do you mean as far as the members of the department being involved?

Q Anything concerning the security unit.

A Well, as I've previously stated in this deposition given in November of '76, there was general talk, chatting, innuendos, jokes to the fact that Mr. Twedell had been doing some investigations directed toward Roscoe Dean. I don't have any definite, direct proof of that. I'm just stateing that from my association within the department and conversations with other members of the department.

Q In one of the memorandums that I'm sure you've seen before, the justification for that complaint investigation was a member of the Georgia House of Representatives told Harold McKenzie about some alleged irregularities and that prompted an investigation. Would that type of communication, alone, could that prompt an investigation? I take it that it obviously could.

A It did.

Q Whatever became of that investigation by the way of Ms. Williams? Do you recall?

A Just a moment. As I recall, someone - somehow this representatives name became known. I think it was just surmised but if he's from Appling County, there can't be very many. He was approached, at which time he got quite upset. In fact, he said he didn't want to be brought into this and so forth. Beyond that I don't recall what might have taken place.

Q This is a stab in the dark, but there's so much that's been said about the petty cash and all that. Do you have any reasonable guess as to what kind of money that you're talking about that was used in a given year that way? I notice in your previous deposition, from time to time some allegations of some very large amounts.

A At one point in time, the petty cash was held at $4,000 and it would get down sometimes within a day, you know

they'd have to go through the process of getting somebody in accounting to place money into that account. I think that during the time of some these, as an aftermath or at least during part of the Plant Hatch investigations, there were larger sums that were given to people. I think that that may be one of the reasons why they've gone into the new procedure for these payments. They go through a draft and also they don't have to physically put the money in the account because they had to run back and forth so much. Under the petty cash system the money had to physically be in that account or it was overdrawn. Under the draft system, they just present the draft and they pay it.

Q Have there been any changes in management of the security unit other than your change?

A That's correct.

Q Are you familiar with the girl in the personnel department who would have been responsible for certain cash payments or vouchers or checks for some of the type activities performed by Reese?

A In what department?

Q In the personnel department.

MR. VANSANT: Let's go off the record.

(OFF THE RECORD)

Q Are you familiar with a stenographer or a clerical person, a female in the public relations department that handled some of these cash payments and checks?

A As far as cash payments and checks, I can't relate that. I understand that there is a person who was employed with that department who has indicated that

they have overheard Mr. Benson boast about the files that he maintains.

Q On individuals?

A Yes.

Q Do you know that girl's name?

I don't. I can only guess of possibly two who have been there and departed; one of which is, I think, a Kathy Mitchell who is no longer there and the other one is Donna Norris.

Q Do you know where Donna Norris lives in Atlanta?

Q You don't know anything about her?

A No.

Q Has Bob Twedell - well, have you ever heard Bob Twedell discuss having gone to Washington to do some undercover work regarding the Nader group up there?

A Yes.

Q Do you remember specifically what he stated about that trip to Washington?

A Yes, it was just general statements in the office. He went there to - I don't recall the exact meeting or seminar that was going on, but he did go there to listen to what was said and he even went so far as to tape Mr. Nader's presentation.

Q Who sent him up there — Benson?

A Benson or Lamb. At that point in time, it probably would have been well, either one of them.

Q Do you know or can you speculate as to the purpose for which he was sent?

A He was sent - it was my understanding he was sent to -one thing was to see the type of people who might be at this meeting or participating in the meeting because it had some direct bearing to do with the utility company.

Q Do you recall him ever mentioning any Georgia people or any of the so-called antagonists to Georgia Power being present there?

A I don't really recall any specific comments. He may have. I really didn't pay that much attention to it other than the fact that, yea, he's going up there for a big time.

Q Did you hear him boast that he slept with Ralph Nader's secretary while he was up there?

A Yes.

MR. VANSANT: I think that's all.

QUESTIONED BY MR. THOMASON:

Q Back on the case numbers and individual files and all of that, particularly as it relates to Gene Guerro, did you ever have occasion to observe anyone placing information on Guerro in the internal security files?

A There was some - the files that were gotten periodically, this Information Digest, I think is the title of it that came into the office, at one point in time they were definitely maintained there, and of course, his name obviously would have been one of those in that. Anybody that had anything bad to say - I imagine if they said 'the sun's not shining too bright today' they might conceivably be put in it.

Q There still is a need on the part of Lamb and Benson to use Research West Corporation, isn't there?

A I can't see or a need.

Q Okay, I'll be more specific. Again, today's examination of the Federal Power Commission Form 1 shows an expenditure for 1976 of over $4,000 to Research West Corporation.

A I'm not aware of that. That's surprising to me because I was sort of led to believe that they no longer dealt with that organization.

Q It was my understanding, too, that they've actually told people that they no longer used them or anything and then this surfaced today.

A Well, that's the impression I had.

MR. THOMASON: That's all I have.

STATEMENT CONCLUDED.

GEORGIA, BIBB COUNTY

I, Paula F. Childre, T-193, Notary Public, State of Georgia, CERTIFY that acting in such capacity on September 23, 1977 I reported the sworn statement of MR. JOHN H. TAYLOR and on the foregoing pages numbered 2 to 69, both inclusive, have transcribed a true and correct transcript thereof.

I FURTHER CERTIFY that I am not counsel for nor related to any party to the above nor am I interested in the event or outcome thereof.

WITNESS my official hand and seal as Notary Public, State of Georgia, this 29th day of September, 1977.

My commission expires

MEMO

TO: DANIEL P. Sheehan,
Attorney

FROM:
Investigator

SUBJECT: William Lovein

DATE: 10-28-77

2:45 P.M., 10-28-77, on the assigned time and date the undersigned investigation with Assistant Chief Investigator Davis interviewed Mr. William LOVIN of Runny Mead Road, Macon, Georgia. This interview was very helpful to the undersigned and our effort in penetrating the investigative department and security department of Kerr-McGee as far as new insight on possible leads.

LOVIN related that if he were conducting an investigation looking for that he would see a technician that worked at the local relay station near Karen Silkwood's apartment in Edmond. LOVIN also stated that it would be helpful if we could get the telephone company or one of their technicians or employees to at least make some imprints of taps or telephones in the Edmond area.

LOVIN also stated that it could be a possibility that the investigative staff or Reading may be the public relations department of Kerr-McGee (a new idea we hadn't thought of prior to this time).

LOVIN related that a Mr. Tom DAVIDSON was one of the investigators from Centennial Security of Dallas, Texas, and may be worthy of interview.

LOVIN confirmed the reports on the company cars that had specific surveillance equipment and interchangeable headlights, etc, etc. LOVIN stated that he still had some of the electrical switches that he took out of his staff car upon being fired with Georgia Power. LOVIN stated that he had heard of Kerr-McGee and had heard of our case before but he was not sure if he heard it around his office or that he had ever seen any type of file or any connection whatsoever between Kerr-McGee and the Georgia Power Corporation.

LOVIN related near about the same information that BAXTER had previously told this investigator and had listed in his newspaper articles.

[Note: He added that the security people had very sophisticated listening devices which they used frequently. – W.D.]

CALIFORNIA TRIP – REPORT #6

TO: DANIEL P. SHEEHAN

FROM:

DATE: JANUARY 6, 1978

RE: DUCOTE

I was unable to meet personally with Jerry Ducote until January 3. But I did check his file and long affidavit to the district attorney, located in the Superior Court Clerk's Office in the San Jose Court House. This was the affidavit he gave in connection with his conviction for burglarizing the United Farm Worker's Office and various others. He explains in it how he got into this whole business and how he thought he was doing the right thing and tells where the files were delivered, the main drop-off being Research West.

Ducote can be presently reached at his place of employment, Western Speakers, Inc., 870 N. First Street, San Jose, California 95112, (408) 294-3417, home phone 292-8898.

In return for his help and cooperation Jerry was given a suspended sentence, so he now speaks quite freely about his life as a professional burglar. Apparently he did not work directly for Research West but was paid by them for free-lance work. I talked to him shortly after the NBC Television broadcast by Paul Altmeyer. Jerry said the NBC affiliate knew about the program and did three disclaimers by their broadcast just prior to the national news. The local affiliate is owned by the *San Francisco Chronicle,* and, needless to say, it is quite unusual for an

affiliate to bad-mouth the national news of their own network.

After the broadcast, Patricia Atthowe was interviewed by a reporter and denied ever knowing Ducote. Ducote claims that she gave him $350 to go to the Liturgical Conference in Washington. She first denied every knowing him and then later said that she gave $350 to him because he was a destitute former cop. Incidentally, for his cover at the Liturgical Conference in Washington, D.C., he went disguised as a priest.

Ducote is an affable person, something of a braggart and must be taken with a grain of salt. Among other things, he mentioned a Col. Lawrence who was supposedly one of the founding board members of Research West and is now head of PG&E security, but PG&E employee list for 1976 showed Mr. Neel as head of security. I have not found Lawrence's name on any of the Research West documents which I have.

Ducote claims that he broke into Bill Stanton's office and stole the files which Stanton had on Research West and PG&E.

One instance of F.B.I. connection with Research West can be confirmed by looking at the testimony of F.B.I. agent Malcom "Buck" Sample, who is Ducote's associatein some of the burglaries. Apparently Sample testified to the fact that he had been taken to Research West and used their file as an F.B.I. man. Ducote also claims that he saw F.B.I. people at Research West on a daily basis.

He told me that Larry Cott, who presently resides at San Rafael – (415) 479-1073 – can confirm the fact that they got information from the F.B.I. For instance, one woman at a leftist rally had her address book lifted from her

pocketbook by an F.B.I. man who Xeroxed it and immed tely brought a copy of the information to Research West. I was not able to meet with Cott personally but I did confirm that he worked at Western Research, the parent of Research West, from 1964-1968.

Ducote also confirmed the fact that writer Ed Montgomery was an F.B.I. pipeline to the press during his time as a writer for the *San Francisco Examiner.*

Ducote suggested that I should visit Charley Bates, the retired head of the F.B.I. in San Francisco. He thinks if I went Bates would talk to me. He has shown some signs of being willing to talk about his own dissatisfaction with F.B.I. practices. He now works for Burns Int. in Oakland.

Ducote also recommended a couple of contracts in Washington, D.C.: (1) John Fogarty, who works for the *San Francisco Chronicle*, Washington Bureau. Apparently John can pinpoint COINTELPRO documents which show F.B.I. links to Ed Montgomery. (2) Gill Bailey, who works for the Ritter Chain (*San Jose Mercury).* His wife was a member of the San Jose Catholic Peace Center which was burglarized by Ducote for Research West. He thinks Bailey would talk.

He also pointed out that within days of one of his own burglaries, two people were refused visas to enter the country. Apparently the information that Ducote stole from some leftist group indicated they were going to invite these people to come to this country for some of their rallies. Ducote uses this example to show information going directly from Research West back to Washington.

CALIFORNIA TRIP – REPORT #11

TO: DANIEL P. SHEEHAN

FROM:

DATE: JANUARY 6, 1978

RE: RESEARCH WEST

Research West is presently located in Suite 300, Bay Bridge Office Plaza, Emeryville, California, telephone (415) 428-2770. It is still not listed in the local directory, and this is a fairly new address. It used to be housed at 1419 Broadway in Oakland where its office door at Suite 501 bore the sign "Trust Department". Presently no attempt is made to hide the identity of Research West, because the name is on the door of the office itself and is also listed on the building's directory down by the elevator.

It was really founded in San Francisco some thirty years ago by Harper Knowles as Western Research Foundation. Knowles is a former U.S. Army Inteligence Officer and was chairman of the American Legion's committee on subversives in the 1930's. He and its co-founder, Nat Pieper, a retired head of the F.B.I. office in San Francisco, were frequent resources to HUAC and the California State Fact-Finding Committee on un-American activities (sometimes called the Burns Committee after its final chairman, State Senator Hugh Burns of Fresno). Knowles was a frequent witness for them in the proceedings that led to the blacklisting of Hollywood screen writers as alleged Communists.

They began Western Research Foundation in 1945 but Pieper retired to Florida (he's at 2401 BayShore Boulevard, Apt. 1401, Tampa, Florida) with a case of

cancer and Knowles finally quit the business because of blindness. But their business was purchased by Harold and Patricia Atthowe, two Catholics, the first of whom was a former deputy sheriff in Alameda County and the latter of whom is best known for her right-wing activities around school board issues. At one time she sued the University of California Regents to force disclosure of student organizations's members and sponsers. The University backed down and gave her the list that she wanted.

The Atthowes purchased Western Research partly with a loan from Robert Lamborn who then worked for Western Research, keeping tabs on Berkeley radicals.

In 1969 the organization was renamed Research West, Inc., and the office was moved to Oakland. Some of its early clients were the *San Francisco Examiner,* PG&E, Pacific Telephone, the F.B.I. and the C.I.A. They are still on retainer by the *San Francisco Examiner* and by PG&E which last year gave them over $25,000 for investigation services. I could not confirm that they are on retainer with the other corporations, but some people say that every major corporation in the Bay Area pays them from one to five thousand dollars for investigation services.

Enclosed as one of the attachments is a copy of their filing with the Department of Corporations for the issuance of securities. Stock was apparently issued to all of the people listed on this front page, namely Harold and Patricia Atthowe, Robert L. Lamborn, James Kramer, and Ken Elston, I also have attached a copy of the articles of incorporation filed October 30, 1969

More will be learned about Research West in the near future since Synanon is going to depose the president of Research West in a lawsuit that they have against the *San Francisco Examiner.* This will probably happen in May.

Also, Mary Mocine, a lawyer for the United Farm Workers intends to depose them soon. And, finally,

EXHIBIT # 17

Affidavit of Howard Kohn Evidencing Statements Made By Defendant Jacque Srouji About Her Possession of James Reading Transcripts of Wiretapped and Electronically-Monitored Private Conversations of Karen Silkwood and Her Union Associates

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

KAREN G. SILKWOOD, By the Administrator of her estate, William M. Silkwood; and Beverly K. Meadows; Michael E. Meadows; and Dawn E. Meadows; the infant heirs of Karen G. Silkwood by their Guardian, William E. Meadows,

Plaintiffs,

v.

THE KERR-McGEE CORPORATION, et al.,

Defendants.

AFFIDAVIT OF HOWARD KOHN, ASSOCIATE EDITOR OF ROLLING STONE MAGAZINE

Now comes Howard Kohn, and having been duly sworn, hereby deposes and says:

1. That I am an Associate Editor of the *Rolling Stone* newspaper, published out of San Francisco, California and New York City;

2. That, in my capacity as a newspaper reporter, I interviewed one Jacque Srouji, a newspaper reporter

employed in 1975 and 1976 by the Nashville *Tennessean* newspaper, in September of 1976;

3. That, during this interview, it became clear to me that Jacque Srouji was aware of the fact that I had been talking with Mr. Peter Stockton, the Staff Investigator for the House Subcommittee on Energy and the Environment, and that I would be speaking with him again after my interview with her;

4. That Jacque Srouji told me that she had gone to Oklahoma City, Oklahoma in March or April of 1975 and had been met at the airport by Lawrence Olson, the F.B.I. Agent in charge of the Karen Silkwood investigation;

5. Jacque Srouji told me that Lawrence Olson had brought his entire Karen Silkwood investigation file to her hotel room and left it with her overnight, so she could Xerox duplicates of his file for her use in her investigation of the Silkwood case;

6. Jacque Srouji told me that Lawrence Olson and James Reading, the man in charge of the Kerr-McGee Corporation's Security Division, had been working together during late 1974 and early 1975 trying to develop evidence demonstrating that Karen Silkwood had intentionally contaminated herself with plutonium taken from the Kerr-McGee Corporation's Nuclear Facility, in an effort to embarrass the Kerr-McGee Corporation and the entire nuclear industry;

7. Mrs. Srouji also told me that Lawrence Olson had used his relationship with Mr. Reading and the officials of the Kerr-McGee Corporation to secure for her exclusive, and secret, interviews with various highly-placed Kerr-McGee officials, during which she obtained information from them;

8. Mrs. Srouji told me that, among the private meetings set up for her by Lawrence Olson, one was with James Reading;

8. Mrs. Srouji told me that, among the private meetings set up for her by Lawrence Olson, one was with James Reading;

9. Mrs. Srouji told me that she and Lawrence Olson, in March or April of 1975, went to meet with James Reading at the Hilton Hotel in Oklahoma City; that at this secret meeting she spoke for a matter of hours with James Reading, and that during this meeting James Reading told her that Kerr-McGee management officials had had Karen Silkwood's telephone wiretapped and electronically "bugged" her home because of their concern about Silkwood's union activities, and that they had placed Ms. Silkwood and some of her union associates under physical surveillance as well;

10. Jacque Srouji told me that during her meeting with James Reading at the Hilton Hotel in Oklahoma City which had been arranged for her by Lawrence Olson, James Reading pulled out copies of a typed transcript of some of these electronically-monitored private conversations of Karen Silkwood and started reading to her excerpts from these transcripts;

11. Jacque Srouji told me that James Reading gave her copies of portions of these transcripts during this meeting, and that he gave her other documents as well from his investigative file compiled on Silkwood and her union associates;

12. Jacque Srouji told me that she and Lawrence Olson shared all of the information each of them obtained during their coordinated investigation of the Silkwood matter.

_____

Howard Kohn

Sworn to before me this 29th day of March 1978.

_____

Notary Public

My Commission Expires:_____

APPENDIX G
THE FIFTH CIRCUIT COURT OF APPEALS' OPINION IN SCOTT v. MOORE, 640 F.2D 708 (MARCH 26, 1981)

APPENDIX G

THE FIFTH CIRCUIT COURT OF APPEALS' OPINION IN SCOTT v. MOORE, 660 F.2d 708 (MARCH 26, 1981)

Paul E. SCOTT et al.,
Plaintiffs-Appellees,

v.

Bill MOORE et al., Defendants,

Laborers International Union of North America, Local No. 870 et al.,
Defendants-Appellants,

International Union of Operating Engineers, etc., AFL-CIO, Local 450,
Defendant-Appellant.

No. 79-1196.

United States Court of Appeals.
Fifth Circuit.

March 26, 1981.

Martin W. Dies, Orange, Tex., William N. Wheat, Paul F. Waldner, Houston, Tex., for IUOE, Local 450.

Robert Q. Keith, Arthur R. Almquist, Beaumont, Tex., for plaintiffs-appellees.

Appeals from the United States District Court for the Eastern District of Texas.

Before CHARLES CLARK, TJOFLAT and GARZA, Circuit Judges.

CHARLES CLARK, Circuit Judge:

This appeal presents important questions concerning the scope of relief available under 42 U.S.C. § 1985(3), the extent of congressional power to enact a civil remedy for wholly private infringement of constitutional rights, and the relationship between section 1985(3) and the labor relations laws. The district court issued a permanent injunction against the defendants, including numerous labor organizations. It also awarded money damages for violations of section 1985(3), concluding that the statute afforded a remedy for the kind of private conspiracy involved here and that Congress was constitutionally empowered to provide such a remedy. For the reasons stated below, we affirm in part and reverse in part.

I. THE FACTUAL BACKGROUND

This case arises out of an episode of mob violence that occurred in the early morning hours of January 17, 1975. The plaintiffs are A.A. Cross Construction Company, Inc., and two of its employees, Paul Scott and James Matthews. The defendants include the Sabine Area Building and Construction Trades Council, a loose confederation of craft and construction unions located in the Port Arthur, Texas, area. Also named as defendants are twenty-five of the Council's member unions and several individual members of some of these labor unions. The individual defendants are not parties to this appeal. The plaintiffs contend that the defendants conspired for the purpose of depriving them of the equal protection of the laws and equal privileges and immunities under the law when they

planned and executed an attack on the Cross construction site, assaulting workers and destroying property.

A.A. Cross Construction Company is a Texas corporation engaged in the building and construction industry as a general contractor. In May, 1974, Cross contracted with the Department of the Army, United States Corps of Engineers to erect the Alligator Bayou Pumping Station and Gravity Drainage Structure on the hurricane levee along Taylor's Bayou near Port Arthur. The agreement had a contract price in excess of $8 million and called for the construction of the pump station with four pumps and a gravity drain for flood control. In accordance with its customary practice, the Cross Construction Company hired its workers for the Alligator Bayou project without regard to union affiliation, employing persons solely on the basis of its own need for the applicant's occupational skills. Cross did not have a collective bargaining agreement with any labor union, and when this incident occurred no union was seeking to organize the company's employees. In addition, Cross often hired workers from outside the Port Arthur community.

Cross Construction Company's hiring practices provoked and antipathetic response from some segments of the Port Arthur community. In fact, on several occasions prior to the eruption of violence on January 17, popular enmity had risen to the level of warnings and threats directed against Cross and its employees. Local residents had confronted Cross employees at a local tavern and pool hall frequented by them, threatening to place pickets at the construction site, promising to make Cross "go union," and occasionally warning of trouble if Cross did not cease hiring nonunion laborers. About three months before the January 17 attack, one of the individual defendants, Bill Moore, approached Mr. Cross and threatened that he

would "hurt you bad," saying. "What is going to happen when that big rig of yours down there burns up?" On another occasion, John Wallace, financial secretary and business representative for the Carpenters Local 610, had told Cross that "this is union country" and that if he persisted in using nonunion labor it was "going to cost you a million dollars."

Meanwhile, during the months preceding the January 17 violence, rumors began to develop concerning a "citizens protest" to be staged at the Alligator Bayou construction site. These rumors contemplated a public demonstration to call attention to the fact that Cross hired nonunion labor and did not have a labor contract with any union as well as to protest the company's policy of hiring employees from outside the Port Arthur community.

There is no direct evidence to show the organizing force behind this protest demonstration, but on Wednesday, January 15, two days before the assault on the Cross jobsite, the Sabine Area building Trades Council held its regular weekly meeting. Cross Construction Company's indifference to prospective employees' union status and its lack of a union contract had long been topics of concern at the council's meetings, and they were once again discussed during the January 15 session. In addition, the group discussed the rumored citizens protest, and some of the union representatives in attendance informed the Council that the demonstration had apparently been scheduled for the following Friday.

On Thursday, the sixteenth, Cross Construction Company learned of the scheduled protest from two union employees associated with the Alligator Bayou project. Fred Dukes, a member of Cement Massons Local 884, worked for Cross as a cement finisher on a two-day job. Earl Stevens, a member of Plumbers Local 504,

worked as a foreman for Cross Construction Company's mechanical subcontractor. Both men received warnings from their respective union business agents about a possible picket or demonstration to be held at the Cross construction site, and both men passed that information along to Cross. Neither Dukes nor Stevens had heard anything about violent or destructive conduct. Nevertheless. Cross directed its employees to report for work at 6:00 a.m. on Friday, an hour earlier than usual, in order to avoid any confrontation between them and the demonstrators.

On the morning of January 17, after most of the Cross employees had arrived at work, a crowd of nearly three hundred people assembled at the main access road leading to the Cross construction site. Several vehicles made brief forays up the access road, and their occupants confirmed with Cross and Scott that they were at the Cross Construction Company jobsite. The crowd began to get unruly, pushing and shoving the remaining Cross workers as they arrived. Nevertheless, Cross's employees began work as usual. Then, shortly after 7:00 that morning, a group of four pickup trucks, each carrying between twelve and eighteen persons, emerged from the crowd gathered at the access road and drove onto the jobsite. Plaintiff Scott went out to meet the intruders and to request them to leave the area, but one of them approached Scott and said, "Man, you all have got to be crazy . . . this is a union town." Scott told his interlocutor that they did not want any trouble, and he attempted to gather together the other employees and to leave the jobsite. However, before he could complete his mission, someone stepped out of the group and struck him on the head. Suddenly, the mob swarmed over the construction site, brutally beating Cross and his employees with iron rods and wooden boards, overturning and setting fire to the trailer that served as the construction site office, smashing automobile and truck

windshields, and vandalizing company tools and equipment. The entire episode lasted only a few minutes, but the destruction was devastating. Cross and his employees were treated for their injuries at a local hospital, and work at the construction site did not resume for nearly three weeks. Some of Cross's employees, frightened by the possibility of repeated attacks at the jobsite, refused to return to work. In addition, the violence and vandalism delayed the completion of the project by about six months, ultimately causing the Cross Construction Company to default in its contractual obligation to the U.S. Army Corps of Engineers.

On January 31, 1975, plaintiffs Scott and Matthews initiated this lawsuit against the individual defendants. They sought and obtained a temporary injunction retraining the then-named defendants and "all persons, firms, and associations combining or conspiring with defendants" from further violent, intimidating, or destructive acts against employees at the Alligator Bayou Pump Station project. Nearly two years later, the plaintiffs amended their complaint, adding A.A. Cross Construction Company, Inc., as plaintiff and the Sabine Area Building and Construction Trades Council along with twenty-five local unions as defendants. The district court found that the plaintiffs had proved a conspiracy to deprive them of the equal protection of the laws, permanently enjoined the building trades council and twenty-four of the unions from future misconduct, and assessed damages against eleven of the union defendants.[1]

[1]The district court assessed damages against the following eleven unions: Laborers International Union of North America, Local 870; Operative Plasters and Cement Massons International Association, Local 884; United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada,

II. THE JURISDICTIONAL QUESTION: INJUNCTIVE RELIEF AND THE NORRIS-LAGUARDIA ACT

The district court issued a permanent injunction against the Sabine Area Building and Construction Trades Council, twenty-four of its member unions, and all persons conspiring with them. The court's injunction ordered that those parties subject to its terms.

> . . . shall not hereafter combine, conspire, threaten, intimidate, assault, or commit any act of violence toward or upon any person, property or possession of any person or his family who may work upon, travel to, deliver materials, goods, or services to A.A. Cross Construction Co., Inc., or to the site of the alligator Bayou Pump Station on Taylor's Bayou near Port Arthur, Jefferson County, Texas.

The defendants contest the district court's power to issue such an injunction, arguing that the Norris-LaGuardia Act deprives the district court of jurisdiction to enjoin labor organizations from engaging in conspiratorial conduct. They maintain that the unembellished language of the Act is sufficient to show the court's usurpation of authority.

Local 195; United Brotherhood of Carpenters and Joiners of America, Local 610; United Brotherhood of Carpenters and Joiners of America, Local 753; International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, AFL-Bridge Structural and Ornamental Ironworkers, Local 125; Sheet Metal Workers International Association, Local 196; Carpenters District Council of Sabine Area; International Brotherhood of Electrical Workers, Local 479; and International Union of Operating Engineers, Hoisting and Portable Engineers, AFL-CIO, Local 450.

[1] We disagree. The Norris-LaGuardia Act was passed for the purpose of limiting the circumstances and conditions under which injunctive action could be taken against labor organizations in the context of a labor dispute. The labor injunction had been an important device used by employers to counter organized labor's most effective economic weapons, strikes, boycotts, and picket lines. However, the Act was predicated on the conviction that labor disputes turned on issues of social and economic policy that could not appropriately be resolved by the courts. The legislative solution to the problems confronting workers in a complex industrial economy was union organization and collective bargaining. Since the ready issuance of labor injunctions presented a serious obstacle to the concerted activities of organized workers Congress decided to remove the federal judiciary from labor disputes. Thus, section 5 of the Act, 29 U.S.C. § 105, limits the equitable power of the federal courts in the following way:

> No court of the United States shall have jurisdiction to issue a restraining order of temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title.

29 U.S.C. § 105.

[2] But the Act does not impose an unqualified prohibition against federal injunctive relief. Section 105 merely restricts the court's power to enjoin concerted or conspiratorial activity where the conduct to be enjoined is an

act enumerated in section 104.[2] The enumerated acts include refusing to work, joining a labor organization, paying or withholding strike benefits from a labor dispu-

[2]Section 104 provides as follows:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to reemain in any relation of employment;
>
> (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;
>
> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
>
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;
>
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
>
> (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
>
> (g) Advising or notifying any person of an intention to do any of the acts heretofore specified;
>
> (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

29 U.S.C. § 104.

tant, lawfully giving aid to a labor disputant who is prosecuting or defending a court action, truthfully and peacefully publicizing a labor dispute, peacefully assembling to promote one's interests in a labor dispute, and agreeing with or inducing other persons to do any of those acts. In short, section 104 interdicts injunctive relief against the legitimate activities of labor unions. However, there is nothing in this provision denying to federal courts the power to enjoin violence, breaches of the peace, or criminal acts simply because they may be committed by persons participating or interested in a labor dispute.

[3] In fact, the Norris-LaGuardia Act itself implicitly recognizes the threatened commission of violent acts as a condition under which an injunction may issue. Section 107 states that no court of the United States has jurisdiction to grant an injunction, Unless, after a hearing, the court finds "[t]hat unlawful acts have been threatened and will be committed unless restrained . . . ." 29 U.S.C. § 107(a) Thus, violence, intimidation, threats,vandalism and combinations or conspiracies to commit such acts may be restrained and enjoined even though they arise in connection with a labor dispute. *See e.g., Westinghouse Broadcasting Co. v. Dukakis,* 412 F. Supp. 580 (D.Mass. 1976); *Potomac Electric Power Co. v. Congress of Racial Equality,* 209 F. Supp. 599 (D.D.C. 1962). The Norris-LaGuardia Act does not divest the district court of jurisdiction to enjoin the kind of violent conduct present in this case.[3]

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[3]Even where jurisdiction to grant injunctive relief is authorized, the Norris-LaGuardia Act imposes strict procedural requirements upon the court. *See* 29 U.S.C. §§ 107-109; *New Negro Alliance v. Sanitary Grocery Co.,* 303 U.S. 552, 561-62, 58 S.Ct. 703, 708, 82 L.Ed. 1012, 1016 (1938). The unions have raised no objections to the procedures employed by the district court in this case.

III. THE STATUTORY QUESTION: THE SCOPE OF REMEDY UNDER 42 U.S.C. § 1985(3)

A. *Griffin v. Breckenridge*

Section 1985(3) was originally enacted by Congress as a part of the Ku Klux Klan Act in order to enforce the Civil War amendments to the Constitution and to provide a means of redress for persons victimized by the Klan's acts of terror and intimidation. The statute imposes civil liability on persons conspiring to deprive another person or class of persons of "the equal protection of the laws, or of equal privileges and immunities under the laws."[4] Narrow judicial construction made section 1985(3) a seldomused remedy during the first century after its enactment. *See, e.g., Collins v. Hardyman,* 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253 (1951). However, the Supreme Court decided in 1971 to "accord to the words of the statute their apparent meaning" and held section 1985(3) provided a civil remedy for damages against wholly

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[4]The relevant part of section 1985(3) reads as follows:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class or persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section. if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3).

private infringements of constitutionally protected rights. *Griffin v. Breckenridge*, 403 U.S. 88, 97, 91 S.Ct. 1790, 1795, 29 L.Ed.2d 338, 345 (1971). In *Griffin*, a group of whites assaulted three black men along a Mississippi highway in the mistaken belief that their victims were the associates of a civil rights worker. The blacks brought an action under section 1985(3) to redress violations of the laws of the United States and of Mississippi, including the rights of free speech, assembly, association, interstate travel, liberty, and security of their persons. The Supreme Court first held that the text of the statute, recent judicial interpretations given to related civil rights provisions, the complementary relationship of the various civil rights statutes, and the legislative history surrounding section 1985(3) all "point unwaveringly to § 1985(3)'s coverage of private conspiracies." 403 U.S. at 101, 91 S.Ct. at 1798, 29 L.Ed.2d at 347.

[4] While eliminating the state action requirement, the *Griffin* court was concerned that the statute, if applied too broadly, would displace many areas of tort law that have traditionally been reserved to the states and thereby violate constitutionally-based principles of federalism. "That the Statute was meant to reach private activity does not . . . mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others." 403 U.S. at 101, 91 S.Ct. at 1798, 29 L.Ed.2d at 347. Accordingly, the Court read section 1985(3) to apply only to actions which are inspired by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." 403 U.S. at 102, 91 S.Ct. at 1798, 29 L.Ed.2d at 348. It then delineated four elements necessary for a plaintiff to establish a § 1985(3) cause of action:

> (1) the defendants must conspire or go in disguise on the highway or premises of another;

> (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and
>
> (3) one or more of the conspirators must commit some act in furtherance of the conspiracy; whereby
>
> (4) another is either (a) injured in his person or property or (b) deprived of having and exercising any right or privilege of a citizen of the United States.

See id. at 102-03, 91 S.Ct. at 1790, 29 L.Ed.2d at 348. Subsequently, this court has added a fifth element,

> (5) that the conspirators' conduct must be unlawful independent of the section 1985(3) violation.

See McLellan v. Mississippi Power & Light Co., 545 F.2d 919 (5th Cir. 1977) (en banc).

The *Griffin* court, having concluded that the plaintiffs had stated a cause of action under section 1985(3), then sought to locate a source of congressional power to reach the private conspiracy alleged. The sources identified in *Griffin* were the Thirteenth Amendment and the constitutional right to travel. 403 U.S. at 104-06, 91 S.Ct. at 1799-1800, 29 L.Ed.2d at 349-50. The Court observed, however, that other provisions of the Constitution, including section 5 of the Fourteenth Amendment, might empower Congress to reach other conspiracies by private persons. *Id.* at 107, 91 S.Ct. at 1801, 29 L.Ed.2d at 351. However, the Court found the facts of that case made it unnecessary to look beyond the Thirteenth Amendment and the right to interstate travel.

B. *The Present Case*

Griffin's principles indicate the plaintiffs here have made out a cause of action under section 1985(3). The facts of this case clearly embody four of the five elements essential to a successful § 1985(3) claim. First, the evidence is sufficient to establish a conspiracy among some of the Council's constituent unions and individual defendants. Second, proof that plaintiffs were assaulted, beaten, and threatened and that property was destroyed establishes the requisite "act in furtherance of the conspiracy. Third, these acts are indisputably illegal apart from § 1985(3) as required by *McLellan*. Fourth, there is evidence of personal injuries, property damage, and economic loss. The only element requiring analysis is the requirement that the conspiracy be for the purpose of depriving a person of the equal protection of the laws or equal privileges and immunities under the laws. This requirement, in turn, has two components: (1) the violation of some protected right and (2) a class-based, invidiously discriminatory animus motivating the violation.

1. *Violation of a Protected Right*

In *Griffin*, the Supreme Court stated that a § 1985(3) conspiracy "must aim at a deprivation of the equal enjoyment of rights secured by the law to all." 403 U.S. at 102, 91 S.Ct. at 1798, 29 L.Ed.2d at 348. The plaintiffs in the case at bar contend that the object of the defendants' conspiracy was to deprive them of their First Amendment right to associate with their fellow nonunion employees. They argue that curtailment of their interest secured by the First Amendment is a deprivation of equal protection of the laws within the meaning of section 1985(3) as interpreted by *Griffin*.

[5, 6] The Ku Klux Klan Act was originally entitled, "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes." 17 Stat. 13 (1871). The guaranties afforded by the First Amendment are protected by the due process clause of the Fourteenth Amendment. *E. g., Williams v. Rhodes,* 393 U.S. 23, 30-31, 98 S.Ct. 5, 10, 21 L.Ed.2d 24, 31 (1968); *New York Times v. Sullivan,* 376 U.S. 254, 276-77, 84 S.Ct. 710, 724, 11 L.Ed.2d 686, 704 (1964); *Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213, 1217 (1940); *De Jonge v. Oregon,* 299 U.S. 353, 364, 57 S.Ct. 255, 260, 81 L.Ed. 278, 283 (1937). Moreover, the right of free association is closely aligned with the right of free speech and is similarly protected by the First Amendment. *E. g., Abood v. Detroit Board of Education,* 431 U.S. 209, 233, 97 S.Ct. 1782, 1798-99, 52 L.Ed.2d 261, 283 (1977); *Healy v. James,* 408 U.S. 169, 181, 92 S.Ct. 2338, 2346, 33 L.Ed.2d 266, 279 (1972); *Baird v. State Bar of Arizona,* 401 U.S. 1, 6, 91 S.Ct. 702, 705, 27 L.Ed.2d 639, 646 (1971); *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 462, 78 S.Ct. 1163, 1171-72, 2 L.Ed.2d 1488, 1499 (1958).

The defendants urge that section 1985(3) does not provide a remedy for private interference with First Amendment freedoms. They appeal to the well-established principle that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminating or wrongful." *Shelley v. Kraemer,* 334 U.S. 1, 13, 68 S.Ct. 836, 842, 92 L.Ed. 1161, 1180 (1948). To support their construction of section 1985(3), the defendants rely upon several decisions of the Seventh Circuit. In *Dombrowski v. Dowling,* 459 F.2d 190 (7th Cir. 1972), the court held that section 1985(3) doe not afford protection against private deprivations of rights protected under the Fourteenth Amendment absent some kind of state involvement. Em-

phasizing the historical connection betwen sections 1983 and 1985(3), the court decided that it is necessary to identify the interests which Congress intended to protec from unequal treatment as well as the kinds of conduct which it meant to proscribe.

> The breadth of the statute's coverage is yet to be determined, but three categories of protected rights have been plainly identified. *Griffin* gives express recognition to a black citizen's Thirteenth Amendment rights and to his federal right to travel interstate; the title of the statute expressly identifies the third category, namely, rights protected by the Fourteenth Amendment. We think the § 1983 cases make it clear that in this third category cases make it clear that in this third category a "state involvement" requirement must survive *Griffin*.

459 F.2d at 195 (footnotes omitted).[5] Subsequently the Seventh Circuit has extended the *Dombrowski* rationale in *Murphy v. Mount Carmel High School*, 543 F.2d 1189 (7th Cir. 1976), expressly holding that section 1985(3) provides no remedy for purely private impairment of First Amendment speech and associational freedoms. *Accord Bellamy v. Mason's Stores, Inc.*, 508 F.wd 504 (4th Cir 1974).

[7] The Seventh Circuit's reasoning is contrary to the Supreme Court's analysis in *Griffin*. Of course, most basic

[5] *Dombrowski* recognizes that there is no statutory requirement of state participation or support for the conduct of the conspirators, *i. e.*, that there is no requirement that the defendants act under color of state law. However, where one suffers a deprivation of a federally created right which necessarily includes some component of state action, *Dombrowski* holds that such state action is also a necessary ingredient of the section 1985(3) cause of action. *See* 459 F.2d at 194-95.

constitutional provisions impose limitations on the power of government to regulate private conduct. Thus, the rights they confer on individuals are typically rights of the individual against the state. But the *Griffin* court, after acknowledging the conceptual difficulties associated with private deprivations of constitutional rights, construed section 1985(3) to reach both public and private constitutional wrongs.

> A century of Fourteenth Amendment adjudication has . . . made it understandably difficult to conceive what might constitute a deprivation of the equal protection of the laws by private persons. Yet there is nothing inherent in the phrase that requires the action working the deprivation to come from the State. Indeed, the failure to mention any such requisite can be viewed as an important indication of congressional intent to speak in § 1985(3) of *all* deprivations of "equal protection of the laws" and "equal privileges and immunities under the laws," *whatever their source.*

403 U.S. at 97, 91 S.Ct. at 1796, 29 L.Ed.2d at 345 (citations omitted and some emphasis supplied). Thus, *Griffin* made it unmistakably clear that section 1985(3) was intended to provide a remedy for all private conspiracies. "It is thus evident that all indicators—text, companion provisions, and legislative history—point unwaveringly to § 1985(3)'s coverage of private conspiracies." *Id.* at 101, 91 S.Ct. at 1798, 29 L.Ed.2d at 347.[6] The *Griffin* Court's method of analysis and the unequivocal language of its

[6]Technically, of course, this language is dicta. *Griffin* grounded its decision on the rights secured to black citizens under the Thirteenth Amendment and the right to inter state travel, both of which operate

opinion foreclose our adoption of the approach taken by the Seventh Circuit.

In addition, the interpretation given to the statute in this circuit makes that approach unnecessary. Although *Griffin* found that section 1985(3) covered purely private conspiracies, it did not announce what might constitute a deprivation of equal protection by private persons. Uncertainty in this regard may have contributed to the Seventh Circuit's decision to retain some form of state involvement as a part of the § 1985(3) cause of action. *See Dombrowski,* 459 F.2d at 194. However, this circuit has adopted a different tack. *McLellan* establishes that section 1985(3) was not intended to redress every conceivable private interference with another's rights. Rather, "the object of a section 1985(3) conspiracy must be to deprive another of the enjoyment of legal rights by independently unlawful conduct." *McLellan,* 545 F.2d at 927 (footnote omitted). The independent illegality requirement was derived in part from the passage in *United States v. Harris,* 106 U.S. 629, 1 S.Ct. 601, 27 L.Ed. 290 (1883), which explains that the only method by which a "private person can deprive another of the equal protection of the laws is by the commission of some offense against the laws which protect the rights of persons, as by theft, burglary, arson, libel, assault, or murder." *Id.* at 643, 1 S.Ct. at 612, 27 L.Ed. at 295. In this way, *McLellan* limited the potentially boundless reach of the statute and provided meaning to the concept of a private impairment of constitutional rights. Therefore, *McLellan* resolved the difficulties

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as limits on individual conduct as well as state conduct. However, we believe that the language and reasoning of *Griffin* on this issue are sufficiently indicative of the Supreme Court's approach to be regarded as dispositive.

perceived by the *Dombrowski* court and made its analysis unnecessary.

[8] It cannot be gainsaid that the defendants' conspiracy comprehended an intent to violate the law independent of section 1985(3). The plaintiffs contend that the conspiracy was calculated to deprive them of the right to freely associate with other nonunion laborers. They have alleged and have sought to prove that the defendants conspired to accomplish this object by assaulting and beating them with wooden boards and iron bars; by destroying tools, equipment, and automobiles; and by overturning and setting fire to the Cross office trailer. The means adopted by the conspirators to deprive the plaintiffs of their rights of free association encompass patent violations of both the civil and criminal laws of Texas. *See, e. g.*, Tex. Penal Code Ann. §§ 22.01 (assault); 22.02 (aggravated assault); 28.02 (arson); 28.04 (reckless damage or destruction) (Vernon 1974). *See generally* W. Prosser, Law of Torts §§ 9-10 (assault and battery); 14 (trespass to chattels). The plaintiffs also offered proof that the conspirators engaged in the very unlawful conduct they conspired to commit and that as a result plaintiffs suffered injury to their persons and property. Under such circumstances, we conclude that section 1985(3) affords a remedy for purely private conspiracies aimed at denying their victims the First Amendment right of free association.[7]

[7]Because of our disposition of the case, it is not necessary to decide whether section 1985(3) also protects against private conspiracies to deny rights secured under state law. *See Life Insurance company of North America v. Reichardt*, F.2d 499 (9th Cir. 1979) (holding violations of state antidiscrimination statute cognizable). It is also unnecessary to decide whether federal *statutory* rights are protected by § 1985(3). *See Novotny v. Great American Federal Savings & Loan*

2. *Discriminatory, Class-Based Animus*

The plaintiffs have also satisfied *Griffin's* class-based, discriminatory animus component of the § 1985(3) cause of action. Our analysis involves two distinct but closely related questions. First, does section 1985(3) coverage extend to private conspiracies founded upon some invidiously discriminatory animus other than racial prejudice? Second, if it does, is the particular class to which the plaintiffs belong, nonunion workers and their employers, one which falls within the statute's protective ambit? We answer both these questions in the affirmative.

[9] There is no allegation that the defendants in this case were motivated by an invidiously disriminatory racial animus, and there is no evidence that would support such an allegation. Indeed, the theory of the plaintiffs' case is that they are the victims of a conspiracy motivated by the defendants' hostility toward nonunion workers of any race and the employers who hire them. We must, therefore, answer the question specifically reserved by *Griffin* and still unanswered in this circuit: does section 1985(3) reach conspiracies founded upon discriminatory animus directed against classes defined by some characteristic other than race?

Griffin noted that not all private conspiracies to interfere with the rights of another would come under the protective umbrella of section 1985(3). The Court determined the congressional purpose was to include only those conspiracies animated by an "invidiously discriminatory motivation."

Ass'n, 584 F.2d 1235 (3d Cir. 1978), *rev'd*, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979) (violations of Title VII). *Cf. McLellan*, 545 F.2d 919 (5th Cir. 1977) (right to file bankruptcy petition not protected.)

> The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or *perhaps otherwise class-based,* invidiously, discriminatory animus behind the conspirators' action.

403 U.S. at 102, 91 S.Ct. at 1798, 29 L.Ed.2d at 348 (some emphasis supplied). Thus, *Griffin* expressly left open the possibility that a § 1985(3) cause of action existed against private conspiracies inspired by some nonracial class bias.

Encouraged by this suggestion, numerous lower courts have already found that section 1985(3) is not limited to protecting classes defined by race. Indeed, we are aware of no post-*Griffin* decision by a circuit court that has limited the scope of the statute to racially-motivated conspiracies. See cases cited *infra* at p. 723.

Furthermore, extending section 1985(3) protection to include conspiracies motivated by nonracial class animus comports favorably with the Supreme Court's approach to other Reconstruction civil rights statutes in recent years "to accord [them] a sweep as broad as [their] language.'" *Griffin v. Breckenridge,* 403 U.S. at 1796, 29 L.Ed.2d at 345. The expansive language of the statute could reach all conspiracies which deprive any class of persons of equal protection fo the laws, not just those animated by racial discrimination. Section 1981 and 1982, for example, both contain specific references to race, and the courts have consistently limited their application to instances of racial discrimination. *See, e. g., McDonald v. Santa Fe Trail Transp. Co.,* 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976) (§ 1981); *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968) (§ 1982); *Olivares v. Martin,* 555 F.2d 1192 (5th Cir. 1977) (§ 1981).

By contrast, however, section 1983 makes no specific reference to race, and a wide variety of nonracial classes have sought and won relief from discriminatory treatment under section 1983. *See, e. g., Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 235, 50 L.Ed.2d 251 (1976) (prisoners); *Johnson v. American Credit Co.,* 581 F.2d 526 (5th Cir. 1978) (debtors attacking state pre-judgment attachment procedure); *Morris v. Michigan State Bd. of Education,* 472 F.2d 1207 (6th Cir. 1973) (sex). Since section 1985(3) also be read to protect nonracial classes.

The conclusion that section 1985(3) is not restricted to protecting victims of racial discrimination is also fully supported by the legislative history surrounding the statute's enactment. Both the congressional debates and the original statute's popular title suggest that the protection of groups who were being terrorized by the Ku Klux Klan (blacks and white Union sympathizers) was the Act's primary objective. Although concern for those persons victimized by Klan violence was the most pressing matter leading to adoption of the Act, both proponents and opponents of the legislation understood that it would cover other groups as well. Representative Hoar described the purpose of section 1985(3) as guaranteeing "that under no temptation of party spirit, under no political excitement, under no jealousy of race or caste, will the majority either in numbers or strenght in any State seek to deprive the remainder of the population of their civil rights." Cong. Globe, 42d Cong., 1st Sess. 335 (1871). Senator Edmunds' famous remarks also aptly illustrate the congressional attitude toward what classes would enjoy section 1985(3)'s protection:

> We do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or set

> of men against another to prevent one [from] getting an indictment in the State courts against men for burning down his barn; but, if in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter . . . then this section could reach it.

Cong. Globe, 42d Cong., 1st Sess. 567 (1871). The congressional debates, which reflect a concern for all groups subjected to the Klan's organized lawlessness, make it appear that the statute's drafters intended to protect groups other than southern blacks.

Griffin, the statutory text, companion civil rights provisions, and the legislative history all indicate that a conspiracy motivated by invidiously discriminatory intent other than racial bias is actionable under section 1985(3).

However, the conclusion that section 1985(3) protects nonracial classes resolves only a part of the problem presented by this case, for we must also determine whether the particular class involved here is one which is covered by the statute's protective cloak.

[10] Precisely what kinds of nonracial classes enjoy section 1985(3)'s protection is far from clear. *Griffin* presented conduct "so close to the core of the coverage intended by Congress that it is hard to conceive of wholly private conduct that would come within the statute" if it did not. 403 U.S. at 103, 91 S.Ct. at 1799, 29 L.Ed.2d at 348. At the same time, the Court's expressed concern over the broad reach of the statute's liberal language dictates the exercise of restraint in defining what nonracial class-

based discrimination is covered. Thus, we expressly limit our holding to a determination that section 1985(3) encompasses a private conspiracy against nonunion laborers and their employer. Appropriate development of judicial precedent demands that further delineation of the statute's outer limits must await specific cases.

[11] Not every conceivable class of persons is covered by the statute. Members of he plaintiff class must share some common characteristic beyond simply being victims of the defendant's conspiratorial conduct. *See, e. g., Askew v. Bloemker,* 548 F.2d 673 (7th Cir. 1976) (homeowners raided by drug enforcement agents); *Harrison v. Brooks,* 519 F.2d 1358 (1st Cir. 1975) (property owners allegedly injured by city council rezoning efforts). The class cannot be so large and amorphous that its members are virtually indistinguishable from the vast majority of the populace. *See, e. g., Blevins v. Ford,* 572 F.2d 1336 (9th Cir. 1978) (nonlawyers). Even some clearly defined and easily identifiable groups have been denied protected status under the statute. *See, e. g., DeSantis v. Pacific Tel. & Tel. Co.,* 608 F.2d 327 (9th Cir. 1979) (homosexuals); *Carchman v. Korman Corp.,* 594 F.2d 354 (3d Cir. 1979), *cert. denied,* 444 U.S. 898, 100 S.Ct. 205, 62 L.Ed.2d 133 (1979) (tenant organizers); *Lessman v. McCormick,* 591 F.2d 605 (10th Cir. 1979) (debtors); *McLellan v. Mississippi Power & Light Co.,* 545 F.2d 919 (5th Cir. 1977) (en banc) (persons who file voluntary bankruptcy petitions); *Bricker v. Crane,* 468 F.2d 1228 (1st Cir. 1972), *cert. denied,* 410 U.S. 930, 93 S.Ct. 1368, 35 L.Ed.2d 592 (1973) (physicians who testify in malpractice suits).

In the absence of Supreme Court guidance as to the kinds of classes protected by section 1985(3) or a method by which protected classes should be identified, our own

en banc decision in *McLellan* provides our gauge. In *McLellan*, we held that the statute does not cover persons who file voluntary petitions in bankruptcy. The decision was based on three factors. First, the legislative history of the Ku Klux Klan Act contains no evidence of congressional concern about discrimination against persons who become insolvent. Second, while the protection afforded by the civil rights acts is not static, it would be inappropriate to enlarge the group of protected classes to include bankrupts when Congress had specifically declined to prohibit discrimination against the. Third, including bankrupts within the ambit of section 1985(3) would be unwarranted in light of the Supreme Court's refusal to characterize the right to file a bankruptcy petition as a fundamental right. 545 F.2d at 932-33.

[12] Applying the *McLellan* factors to our case today, we find that the plaintiffs constitute a class for § 1985(3) purposes.[8] The labor union movement in America was yet to be born when the 42d Congress was in session, so it could not have been specifically concerned with discrimination perpetrated against nonunion laborers. However, the congressional debates evince a hearty regard for persons who are victimized because of their political belief and associations. Today's Ku Klux Klan proclaims itself to be a racist organization. But in 1871 it was regarded primarily as a political one. The motives and ambitions of the Klan disturbed the Republicans in the 42d Congress because they feared that its activities would defeat the policies of Reconstruction and deprive the newly eman-

[8]Our reliance upon the factors deemed relevant in *McLellan* does not necessarily imply that they are the only relevant considerations. Conceivably, other factors may be regarded as sufficient to include or to exclude other classes from § 1985(3) coverage.

cipated blacks of rights secured to them under the recent amendments to the Constitution. Senator John Sherman of Ohio voiced this concern after he read aloud from a copy of the Klan's secret oath,

> showing that here is a political organization, with political ends, political aims; it shows that the object and intent of that political organization is to prevent large masses of the people of the southern States from enjoying a right which has been guaranteed to them by the Constitution of our country.

Cong. Globe, 42d Cong., 1st Sess. 153 (1971). The Klan's political objective formed a recurrent theme in the Senate debates.[9]

The apprehension of Republican senators over the Klan's scheme of terrorizing citizens for their political views and of preventing voters from exercising their franchise also echoed throughout the debates conducted in the House. Representative Ellis Robert of New York expressed this condern in the following terms:

> But one rule never fails: the victims whose property is destroyed, whose persons are mutilated, whose lives are sacrificed, are always Republicans. They may be black or white; they

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[9]*See, e. g.*, Cong. Globe, 42d Cong., 1st Sess. 252 (remarks of Sen. Morton) ("[t]he purpose [of the Klan] is by these innumerable and nameless crimes to drive those who are supporting the Republican party to abandon their political faith or to flee the State."); *id.* at 504 (remarks of Sen. Pratt) (the primary purpose of the Klan "is to punish men for their political opinions"); *id.* at 702 (remarks of Sen. Edmunds) (the "systematic plan [of the Klan] is not to leave in any of those States a brave white man who dares to be a Republican or a colored man who dares to be a voter").

> include those who wore the blue and those who wore the gray; newcomers and life-long residents, but only Republicans. Stain the door lintels with the mark of opposition to reconstruction and of hostility to the national Administration and the destroying angel passes by. Omit that sign and the torch may kindle the roof that covers women and children . . . . Such uniformity of result can come only from design. Republicans only are beaten and mutilated and murdered, because the blows are aimed at Republicans only.

Cong. Globe, 42d Cong., 1st Sess. 412-13 (1871). Other Republican congressman expressed similar views.[10] *See* generally Comment, *A Construction of Section 1985(c) in Light of its Original Purpose,* 46 Univ. Chi.L.Rev. 402, 407-420 (1979).

Thus, whereas *McLellan* could locate no indication of congressional purpose to protect persons discriminated against for filing bankruptcy petitions, the legislative history reflects a pervasive concern for persons conspired against for their political associations. The congressional debates surrounding adoption of the Act therefore provide support for including within the ambit of section 1985(3) those such as the plaintiffs who are punished because of their associations.

Similarly, enlarging the scope of the statute to include nonunion workers who are attacked for their choice to

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[10] *See, e. g.,* Cong. Globe, 42d Cong., 1st Sess. 72 (remarks of Rep. Blair) (the Klansmen "murder for a difference in political opinions") *id.* at 333 (remarks of Rep. Hoar) (the Klan is a "secret political conspiracy"); *id.* at 391 (remarks of Rep. Elliott) ("the design of the Ku Klux is political"); *id,* at 488 (remarks of Rep. Lansing) ("the Ku Klux in their crimes are inspired by political zeal").

associate with other nonunion workers, thereby enabling an employer to offer significant work to the class, is appropriate in light of subsequently enacted federal legislation. While Congress has specifically refused to prohibit discrimination against bankrupts in legislation it has enacted on the subject, it has manifested a desire to protect laborers who opt not to affiliate themselves with a labor organization. Section 7 of the original Wagner Act provided that

> [e]mployees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Wagner Act, § 7, 49 Stat. 452 (1935). When Congress passed the original Act, it rejected the argument that parity required granting protection against coercive tactics of labor organizations as well as against those committed by employers. *See* S.Rep. 573, 74th Cong., 1st. Sess. 16 (1935).

However, significant change was not long in coming. The 1947 Taft-Hartley amendments to the National Labor Relations Act brought the addition of unfair labor practices by labor organizations. The Taft-Hartley Act retained the right to form, join, or assist labor organizations, but it revised section 7 of the original Act so it would contain "the right to refrain from any or all such activities." Talft-Hartley Act, § 101, 61 Stat. 140 (1947), currently codified at 29 U.S.C. § 157. Section 8(b)(1) now declares it to be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed by section 7. 29 U.S.C. § 158(b)(1).

Congress has thereby underscored the importance of the right of free association in the labor relations context and has guaranteed the right to a free and untrammeled choice to associate or not to associate with a labor organization. This manifestation of congressional concern for those in plaintiffs' class makes their protection by section 1985(3) particularly appropriate.

Finally, *McLellan* regarded the Supreme Court's refusal to call the right to file a bankruptcy petition a fundamental right as relevant to its own determination that bankrupts are not protected by section 1985(3). By contrast, the Supreme Court has characterized the right of free association as "a right which, like free speech, lies at the foundation of a free society." *Shelton v. Tucker,* 364 U.S. 479, 486, 81 S.Ct. 247, 251, 5 L.Ed.2d 231, 236 (1960). Our legal system honors the freedom of the individual to associate as he chooses because that freedom "tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change." *Gilmore v. City of Mobile,* 417 U.S. 556, 577, 94 S.Ct. 2416, 2427, 41 L.Ed.2d 304, 321 (1974). The importance of the freedom of association has led the court to call it one of the "indispensable liberties," *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 461, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488, 1499 (1958), which ranks "among our most precious freedoms." *Williams v. Rhodes,* 393 U.S. 23, 30, 89 S.Ct. 5, 10, 21 L.Ed.2d 24, 31 (1968). The right of association is fundamental in our constitutional scheme of values. Thus, the difference in importance assigned to the right to file a bankruptcy petition and the right of the individual to freely associate with others of his own choosing favors protecting these plaintiffs.

Our determination that the plaintiffs constitute a pro-

tected class under section 1985(3) also comports favorably with the construction of the statute given by other courts. The lower federal courts have accorded § 1985(3) protection to two broad categories of nonracial classes. The first category consists of classes whose members are identified with one another by some inherited or immutable physical trait or by a history of past discrimination. See, e. g., *Life Insurance Company of North America,* 591 F.2d 499 (9th Cir. 1979) (women); *Marlowe v. Fisher Body,* 489 F.2d 1057 (6th Cir. 1973) (Jews); *Baer v. Baer,* 450 F. Supp. 481 (N.D.Cal. 1978) (members of the Unification Church); *Mandelkorn v. Patrick,* 359 F. Supp. 692 (D.D.C. 1973) (Children of God). Women, ethnic minorities, and religious sects are usually included under the statute because they are classes whose members bear no responsibility for their distinctive characteristics or because membership in the class has traditionally inflamed the irrational fears and hatreds of the majority.[11] Thus, they may be regarded as one of the groups which "require and warrant special federal assistance in protecting their civil rights." *DeSantis v. Pacific Tel. & Tel. Co.,* 608 F.2d at 332-33. The plaintiffs cannot claim they are distinguished from other persons by some immutable or inherited

[11] With respect to women, the Third Circuit has said that "[t]he fact that a person bears no responsibility for gender, combined with the pervasive discrimination practiced against women, and the emerging rejection of sexual stereotyping as incompatible with our ideals of equality" is sufficient to warrant treating gender as a characteristic comparable to race. *Novotny' v. Great American Federal Savings & Loan Ass'n,* 584 F.2d 1243 (3d Cir. 1978), *rev'd on other grounds,* 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979). Similar treatment of religious minorities can be justified because they often provoke the "fear, hatred and irrationality of the majority." *Baer v. Baer,* 450 F. Supp. 481, 491 (N.D.Cal. 1978).

physical trait, like race or gender, over which they have no control.

However, courts have also granted protection to classes whose members are discriminated against because of their political beliefs of their associations. *See, e. g., Means v. Wilson,* 522 F.2d 833 (8th Cir. 1975), *cert denied,* 424 U.S. 958, 96 S.Ct. 1436, 47 L.Ed.2d 364 (1976)(supporters of a particular political candidate); *Glasson v. City of Louisville,* 518 F.2d 899 (6th Cir.), *cert. denied,* 423 U.S. 930, 96 S.Ct. 280, 46 L.Ed.2d 258 (1975) (political demonstrators); *Smith v. Cherry,* 489 F.2d 1098 (7th Cir. 1973), *cert. denied,* 417 U.S. 910, 94 S.Ct. 2607, 41 L.Ed.2d 214 (1974) (voters for a sham political candidate); *Cameron v. Brock,* 473 F.2d 608 (6th Cir. 1973) (supporters of incumbent sheriff); *Action v. Gannon,* 450 F.2d 1227 (8th Cir. 1971) (worshipers at a predominantly white Catholic church disrupted by black civil rights protesters). It is within this second category of classes that plaintiffs fall.

Plaintiffs were denied the equal protection of law because they did not belong to a labor organization or worked for an employer which did not have a collective bargaining agreement and which hired workers without regard to their union membership. One of the unidentified co-conspirators made it clear to the plaintiffs before the destruction began that Port Arthur was a "union town." The plaintiffs were attacked and beaten and property was destroyed because they chose to exercise their right not to join a labor organization and to work with others of the same mind. In view of the foregoing considerations, we hold that the plaintiffs belong to a class protected by section 1985(3).

[13] Our decision does not imply that every union-

nonunion controversy can create a section 1985(3) cause of action. Neither does it imply that every instance of violence arising in the context of a labor dispute will necessarily do so. Powerful limitations exist to restrict an overly broad application of the statute. *See generally McLellan,* 545 F.2d at 940-41 (Godbold, J., dissenting). Section 1985(3) cannot be invoked to disrupt the operation of a carefully integrated statutory scheme. *See generally McLellan,* 545 F.2d at 940-41 (Godbold, J., dissenting). Section 1985(3) cannot be invoked to disrupt the operation of a carefully integrated statutory scheme. *See Great American Federal Saving & Loan Ass'n v. Novotny,* 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979) (holding that deprivation of a right created by Title VII cannot form the basis for § 1985(3) cause of action). Neither can a § 1985(3) cause of action be predicated upon a simple unfair labor practice. *Cf. United States v. DeLaurentis,* 491 F.2d 208 (2d Cir. 1974) (holding an unfair labor practice not cognizable under 18 U.S.C. § 241, the criminal analogue to section 1985(3)). Unionism or nonunionism in and of itself does not create a covered class. But where, as here, there is no campaign to organize employees and force or violence is used to deprive nonunion workers and their employer of the right to freely associate with one another, a section 1985(3) action will lie.[12]

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[12]It should be observed that the National Labor Relations Board has a long-established policy against awarding monetary damages for physical injury and property damage caused by strike or picket line violence for which the union is held responsible. *See Union de Tronquistas Local 901 (Lock Joint Pipe & Co.).* 202 N.L.R.B. 399 (1973); R. Gorman, Basic Text on Labor Law 217 (1976); D. McDowell & K. Huhn, NLRB Remedies for Unfair Labor Practices 99-100 (1976). The Board's refusal to give damage awards is predicated in part upon its view that such awards would unduly interfere with the policy of the National Labor Relations Act to protect concerted activities and that other remedies against union violence are sufficient deterrent. *Union*

IV. THE CONSTITUTIONAL QUESTION: THE SOURCE OF CONGRESSIONAL POWER

[14] Having determined that section 1985(3) was intended to provide a civil remedy for the kind of conspiracy involved here, we must respond to defendants' argument that Congress lacks the constitutional power to enact legislation of this breadth. The plaintiffs maintain that section 5 of the Fourteenth Amendment authorizes Congress to provide a civil remedy for this private conspiracy. On the particular facts before us, we hold that the Commerce Clause empowers Congress to reach defendants' conduct and do not reach the Fourteenth Amendment issue.

Griffin emphasized that it was unnecessary to test the constitutionality of section 1985(3) in all conceivable applications in order to sustain its facial constitutionality and its application to the facts of any particular case. 403 U.S. at 105, 91 S.Ct. at 1799, 29 L.Ed.2d at 350. *Griffin*

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de Tronquistas, 202 N.L.R.B. at 400. Its practice is also grounded in concern for the proper institutional role to be played by the Board. *See District 1199, National Union of Hospital and Health Care Employees (Frances Scherver Home and Hospital)*, 345 N.L.R.B. 105 (1979) (Board is not equipped to handle personal injury claims); *Union Nacional de Trabajadores*, 219 N.L.R.B. 157 (1975) (awards are punitive and, therefore, not part of the Board's statutory function).

Whatever the basis for the Board's refusal to order compensation for injuries suffered during strike or picket line violence, our decision that section 1985(3) affords a remedy in this case does not offend that policy. In this case, no lawful concerted activity was taking place when the Cross construction site was attacked. There was no organizational campaign, no union demand for recognition, no informational picket, and no collective bargaining in progress. In such circumstances, a civil remedy for damages presents no danger of thwarting the Board's policy. However, whether section 1985(3) should also extend to other conspiracies against nonunion workers and their employers is a question which we expressly pretermit.

also makes clear that section 1985(3) is not unconstitutional merely because it reaches wholly private conspiracies. By the same token, it indicates that a source of congressional power must be identified to warrant application of the statute in each case.

The *Griffin* court concluded that the Thirteenth Amendment and the constitutional right to interstate travel authorized Congress to reach the private conspiracy alleged there. But the court concluded its opinion, stating.

> In identifying these two constitutional source of congressional power, we do not imply the absence of any other. More specifically, the allegations of the complaint in this case have not required consideration of the scope of the power of Congress under § 5 of the Fourteenth Amendment.

Id. at 107, 91 S.Ct. at 1801, 29 L.Ed.2d at 351.

The plaintiffs' § 1985(3) action cannot be sustained under the Thirteenth Amendment, for they are neither a racially oppressed group nor suffering in the bonds of involuntary servitude. *See, e. g., Jones v. Mayer,* 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968); *Clyatt v. United States,* 197 U.S. 207, 25 S.Ct. 429, 49 L.Ed. 726 (1905). Neither can it be supported by the right to travel on the present record. Although the plaintiffs alleged that the object of the defendants' conspiracy was to deprive them of the right to interstate travel, they have introduced no evidence to show that either the purpose of the result of the conspirators' acts was to infringe upon their right to such travel.

However, the alternative path suggested by *Griffin* is itself fraught with uncertainty. A major controversy still

exists over the extent to which section 5 of the Fourteenth Amendment grants Congress the power to reach wholly private conduct. Particularly whether section 1985(3) can be constitutionally applied to private, nonracially motivated conspiracies is a question which has divided the circuits. *Compare Action v. Gannon,* 50 F.2d 1227 (8th Cir. 1971) *and Richardson v. Miller,* 446 F.2d 1247 (3d Cir. 1971) (holding that the Fourteenth Amendment authorizes Congress to reach purely private conduct) with *Murphy v. Mount Carmel High School,* 543 F.2d 1189 (7th Cir. 1976) (finding that it does not). Furthermore, no single interpretation of the expanse of Congress's power under section 5 has consistently commanded the adherence of a majority of the Supreme Court. *Compare United States v. Guest,* 383 U.S. 745, 762, 86 S.Ct. 1170, 1180, 16 L.Ed.2d 239, 251 (1966) (Clark, J., concurring, joined by Black and Fortas, JJ.) *and id.* at 782, 86 S.Ct. at 1190, 16 L.Ed.2d at 263 (Brennan, J., concurring and dissenting, joined by Warren, C.J. and Douglas, J.) (suggesting that § 5 empowers Congress to punish purely private conspiracies to deprive Fourteenth Amendment rights), *with, id.* at 753-60, 86 S.Ct. at 1175-80, 16 L.Ed.2d at 246-250 (opinion of the Court by Stewart, J., relying on right to interstate travel) *and id.* at 762, 86 S.Ct. at 1180, 16 L.Ed.2d at 251, (Harlan, J., concurring and dissenting). *See Oregon v. Mitchell,* 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970); *Katzenbach v. Morgan,* 384 U.S. (1970); *Katzenbach v. Morgan,* 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966).

We need not depend on this uncertain precedent for congressional power. *Griffin* clearly contemplated that other sources of congressional power might be available to justify other applications of section 1985(3). Indeed, the original proponents of the Ku Klux Klan Act did not base

their assertion of congressional power exclusively on the Fourteenth Amendment. *See, e. g.*, Cong. Globe, 42d Cong., 1st Sess. 81 (1871) (remarks of Rep. Bingham) ("It was always competent for the Congress of the United States by law to enforce every affirmative grant of power . . . ."); *id.* at 477-78 remarks of Rep. Shellabarger (referring to the amendment to § 2 "so far as it is not confined to infractions of rights which are clearly independent of the Fourteenth Amendment, referable to and sustained by the old provisions of the Constitution"). On the facts presented in this case, Congress has the authority to reach a wholly private conspiracy under the commerce power conferred by article I, section 8 of the Constitution.

A.A. Cross Construction Company is a general contractor in the building and construction industry. The record indicates that during the year preceding the violent episode of January 17, 1975, Cross had performed work outside of Texas valued in excess of $300,000. During that same period, Cross purchased goods and materials which originated outside of Texas, were used in its operations within Texas, and were valued at more than $50,000. In addition, at the time of the attack on the Alligator Bayou construction site, Cross was performing its obligations under a contract with the United States Army Corps of Engineers.

[15] Article I, section 8, clause 3 of the Constitution confers upon Congress the power "[t]o regulate Commerce . . . among the several states" and clause 18 of the same article grants it the power "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers . . . ." As the Supreme Court has pointed out, this grant of power "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power over it, as to make regulation of them appropriate means to the attainment of a legitimate

end, the effective execution of the granted power to regulate interstate commerce." *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119, 62 S.Ct. 523, 526, 86 L.Ed. 726, 732 (1942). "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460, 464, 69 S.Ct. 714, 716, 93 L.Ed. 805, 811 (1949). *See United States v. Darby*, 312 U.S. 100, 118, 61 S.Ct. 451, 459, 85 L.Ed. 609, 619 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37, 57 S.Ct. 615, 624, 81 L.Ed. 893, 911 (1937). Moreover, that the volume of goods and supplies purchased by Cross or that the volume of business done outside of Texas is comparatively small in tems of the total amount of goods moved or work performed in interstate commerce is not significant. *Katzenbach v. McClung*, 379 U.S. at 304, 85 S.Ct. at 377, 13 L.Ed.2d at 298. And it is not constitutionally relevant that Congress was actually "legislating against moral wrongs" when it enacted the provisions in question. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257, 85 S.Ct. 348, 357, 13 L.Ed.2d 258, 268 (1964). Chief Justice Marshall's classic formulation of the extent of congressional power is still viable.

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

McCulloch v. Maryland, 4 Wheat. 316, 421, 4 L.Ed. 579, 605 (1819).

By these standards, Congress acted within its constitutional power when it enacted section 1985(3) to reach the

private conspiracy involved here. It cannot be denied that the aim of protecting interstate commerce from undue burdens is a legitimate end. Congress could reasonably have determined that violent attacks and vandalism perpetrated on the workers of a construction firm engaged in interstate commerce would have a disruptive effect on the flow of products and services among the states. It is also beyond dispute that the aim of protecting interstate workers in the exercise of their First Amendment associational freedoms is a legitimate end. The means adopted for the accomplishment of these ends, a private civil remedy for damages, is plainly reasonable and appropriate. Section 1985(3) as applied to the facts before us is compatible with both its letter and its spirit. Whether section 1985(3) can constitutionally be aplied to other kinds of wholly private conspiracies to deprive persons of their civil rights is a question for another day.

V. THE EVIDENTIARY QUESTION: STANDARD OF PROOF AND SUFFICIENCY OF EVIDENCE

A. *The Standard of Proof*

[16, 17] The unions contend that they cannot be held liable for unlawful acts committed at the Cross construction site by some individual members of their organizations without "clear proof" that they actually participated in the unlawful conduct, gave prior authorization of it, or ratified the acts after actual knowledge of their commission. This more rigorous standard of proof derives from section 6 of the Norris-LaGuardia Act which provides:

> No officer or member of any association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts

> of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

29 U.S.C. § 106. This statutory standard of proof thus lies somewhere between the traditional burdens of reasonable doubt and preponderance of the evidence. With it, Congress intended to require "clear, unequivocal, and convincing proof" of union involvement in unlawful conduct to impose liability for it. *United Mine Workers v. Gibbs,* 383 U.S. 715, 737, 86 S.Ct. 1130, 1145, 16 L.Ed.2d 218, 234 (1966). Yet, while section 106 requires clear and convincing evidence as to union authorization, participation in, or ratification, of the acts allegedly performed by its members, it does not prescribe a different standard of proof for other issues in actions against a union or its officers or members involved in a labor dispute. *Ramsey v. United Mine Workers,* 401 U.S. 302, 91 S.Ct. 658, 28 L.Ed.2d 64 (1971).

The unions also recognize that section 106 is by its own terms limited to cases in which the union is participating or interested in a labor dispute. The Norris-LaGuardia Act defines a "labor dispute" to encompass.

> any controversy concerning terms and conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, charging, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

29 U.S.C. § 113(c). The unions insist that the literal language of section 113(c) squarely covers the conduct at

issue here. The persons who planned and executed the attack on the Alligator Bayou construction site were motivated by their resentment of Cross's employment practices and hostility toward its nonunion workers. Because the conspiracy that generated the case was formed around this nonunion animus the defendants maintain that the controversy out of which this case arose cannot be anything other than a labor dispute.

[18, 19] This approach has a certain superficial appeal. Doubtless the attack on the Cross construction site was conceived in reprisal for the refusal of Cross and his workers to accede to demands that the Alligator Pumping Station project be conducted as a union job. Nevertheless, in construing any congressional enactment it is necessary to interpret the meaning of the words as they are used in relation to the setting in which they were written, with due regard to the mischief which the legislation was designed to remedy. In that light, these unions were not participating in a "labor dispute" as that language is employed in section 113(c) because their activity does not fall within the abuses that Congress intended to prevent.

The Norris-LaGuardia Act was passed in a particular social, economic, and legal milieu. During the early part of this century, federal injunctive powers were often invoked to check the spread of union organization and collective bargaining. But Congress conceived that the courts were being made to play a partisan role in labor-management conflicts, in part because judicial injunctive relief usually did nothing to resolve the underlying industrial dispute. The Norris-LaGuardia Act was intended to curb this unwarranted judicial interference in the struggle between employers and employees. Instead, Congress decided to allow such controversies to be settled through negotiation and through the free play of economic forces.

> The Norris-LaGuardia Act . . . was designed primarily to protect working men in the exercise of organized, economic power, which is vital to collective bargaining . . . . Congress acted to prevent the injunctions of the federal courts from upsetting the natural interplay of the competing economic forces of labor and capital.

Brotherhood of Railroad Trainmen v. Chicago River and Indiana Rd., 353 U.S. 30, 39, 77 S.Ct. 635, 640, 1 L.Ed.2d 622, 628 (1957). Thus, the policy section of the Act stresses the worker's "freedom of association, self organization, and designation of representatives of his own choosing" as indispensable to the private settlement of these disputes. 29 U.S.C. § 102. Congress thereby made the use of legitimate economic weapons – the picket, the strike, the boycott – part of the warp and woof of our national labor relations policy. *See generally Boys Markets, Inc. v. Retail Clerk's Union, Local 770,* 398 U.S. 235, 250-51, 90 S.Ct. 1583, 1592, 26 L.Ed.2d 199, 210 (1970); *Milkwagon Drivers' Union v. Lake Valley Farm Products, Inc.*, 311 U.S. 91, 100-03, 61 S.Ct. 122, 127-28, 85 L.Ed. 63, 68-70 (1940); A. Cox, D. Bok, & R. Gorman, Labor Law 60-64 (8th ed. 1977).

One of the special abuses identified by Congress was the use of vicarious liability doctrines under which the misconduct of a few individuals could be attributed to the labor organization that sponsored a strike or picket line. Courts had applied the common law of conspiracy to hold unions responsible not only for the conduct of their authorized agents, but also "for every act committed by any member of a union merely because he was a member, or because he had some relation in the union although not authorized by virtue of his position to act for the union in what he did."

United Brotherhood of Carpenters and Joiners v. United States, 330 U.S. 395, 419, 67 S.Ct. 775, 788, 91 L.Ed. 973, 991 (1947) (Frankfurter, J., dissenting).

This conspiracy approach to union responsibility could frustrate the labor relations policy chosen by Congress. Imposing liability on the union for the unauthorized lawlessness of its more improvident members would penalize the union lawfully engaged in using the legitimate economic weapons thought necessary for the proper resolution of labor-management conflicts. Therefore, Congress enacted section 106, requiring clear proof of union participation in, authorization, or ratification of unlawful conduct before liability could attach.

However, there is no danger of frustrating the congressional policy favoring collective bargaining and no risk of punishing union engagement in protected activity in the case before us. When the events giving rise to this case occurred, no union had a collective bargaining agreement with Cross, and none was seeking recognition as the collective bargaining representative for Cross's workers. No solicitation or other organizational efforts were in progress to attain representation of the Cross employees. No labor organization was staging an informational picket to publicize Cross's employment practices. In short, there were no legitimate union activities taking place when the Alligator Bayou construction project was attacked. Here, some irresponsible individuals sympathetic to the cause of organized labor in Port Arthur, Texas, simply decided to make the Cross construction project an example for other unorganized companies and nonunion workers in the community. This is not the kind of controversy contemplated by Congress when it required "clear proof" of misconduct by a union "participating or interested in a labor dispute."

[20] On the other hand, a labor dispute does exist where unlawful conduct occurs in conjunction with some legitimate union activity. *See, e. g., Cedar Crest Hats, Inc. v. United Hatters, Cap & Millinery Workers Int'l Union,* 362 F.2d 322, 327-28 (5th Cir. 1966). A labor dispute may also exist even though the otherwise legitimate union conduct is unlawful under some other statutory scheme. *See, e. g., Marine Cooks & Stewards v. Panama Steamship Co.,* 362 U.S. 365, 370-71, 80 S.Ct. 779, 783-84, 4 L.Ed.2d 797, 801-802 (1960); *Order of R. R. Telegraphers v. Chicago & N. W. Ry.,* 362 U.S. 330, 339 n. 15, 80 S.Ct. 761, 766 n. 15, 4 L.Ed.2d 774, 781 n. 15 (1960); *Milkwagon Drivers' Union v. Lake Valley Farm Products, Inc.,* 311 U.S. at 103, 61 S.Ct. at 128, 85 L.Ed. at 70. But neither situation is present here. Our holding, therefore, is necessarily a very narrow one: where a labor organization is accused of engaging in unlawful activity not associated with any on-going legitimate union conduct, the union is not participating in a labor dispute within the meaning of 29 U.S.C. § 113(c). Therefore, since the violence at the Alligator Bajou construction site did not occur in conjunction with a labor dispute. the clear-proof standard of section 106 is not applicable.

B. *Sufficiency of the Evidence*

[21] The unions finally urge that the evidence adduced at trial is insufficient to support the judgment against them under any standard of proof. After carefully reviewing the entire record, we agree that the evidence does not warrant the district court's finding of involvement in the conspiracy for many of the unions vouched in judgment. However, as to the remaining unions, we cannot say that the factual conclusions reached by the district court are clearly erroneous.

[22] The factual findings made and the inferences drawn by the district court "come here well armed with the buckler and shield" of the clearly erroneous rule embodied in Federal Rule of Civil Procedure 52(a). *Horton v. U.S. Steel Corp.*, 286 F.2d 710, 713 (5th Cir. 1961). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746, 765 (1948). The appellate court must be especially reluctant to disregard a factual finding based upon the evaluation of testimony that draws credibility into question, *Graver Tank and Mgf. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 69 S.Ct. 535, 537-38, 93 L.Ed. 672, 676 (1949); it may not consider the evidence anew, *Zenith Radio Corp. v. Hazeltime Research, Inc.*, 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129, 151 (1969); and merely because it might have reached a different result on the same evidence will not justify its setting the district court's findings aside. *United States v. National Ass'n of Real Estate Bids*, 339 U.S. 485, 495-96, 70 S.Ct. 711, 717, 94 L.Ed. 1007, 1016 (1950).

The court below concluded that the assault on the Alligator Bayou construction site "evolved from a meeting held by the Executive Committee of the Sabine Area Building and Construction Trades Council on January 15, 1975, wherein a 'citizen protest' was discussed and a time and place were chosen, for such a protest." 461 F. Supp. at 226. However, the evidence in the record does not support this inference. There was nothing unique about the January 15 congregation; it was the Council's regularly scheduled weekly meeting. The minutes of the meeting contain only one cryptic entry which might conceivably be

construed to refer to the Cross construction site protest, and it is wholly innocuous,[13] In addition, those union representatives who actually attended the meeting testified that the committee discussed the Cross project and that some members mentioned they had heard of a demonstration to be held on the jobsite the following Friday. The import of their testimony is that the protest had already been conceived several weeks before January 15 and that neither the time nor the place for it were set by the Council. Furthermore, there is no evidence that the Council endorsed the planned protest: no motions were offered and no formal resulutions were adopted. The only connection between the Wednesday meeting and the Friday violence is the nearness in time between the two events. Given the regular sequence of such weekly meetings, this link is too tenuous. As to those unions against which the only evidentiary link is their participation in the January 15 meeting of the Sabine Area Building and Construction Trades Council, the judgment of the district court must be reversed.

An additional fact casts the district court's error into even sharper relief. The court exonerated two unions as to which the only evidence of involvement was their representation at the January 15 meeting, yet it held other unions liable even though the proof against them was no stronger. Furthermore, the district court held the Operating Engineers, Local 450, liable, and that organization neither belonged to the Building and Construction Trades Council nor attended its January 15 meeting nor was otherwise shown to be connected with the violence. The additional evidence relevant to the Operating Engineers is no more compelling. The judgment against the union of Operating Engineers, Local 450, must too be reversed.

[13] The minutes show that the "good and welfare" of the community were discussed.

However, the situation is different with respect to the United Brotherhoood of Carpenters and Joiners of America, Local 610. In mid-summer of 1974, before construction began on the Alligator Bayou project, Cross received a visit in his Houston office from an official of the union. John Wallace, financial secretary and business representative for the Carpenters Local 610, gave Cross his business card and informed him that he wanted the union to furnish laborers for the job. He also asked Cross to sign a union contract. Cross agreed to hire members of Wallace's union but refused to enter into the proposed agreement. Wallace then told Cross that his refusal would "cost him a million dollars."

Wallace had no further contact with the Alligator Bayou project until January 17, 1975, when the attack occurred. On that day, Wallace was present at the highway near the access road which led to the Cross jobsite on at least two separate occasions. More damaging, however, is the fact that Wallace was also observed with Robert Fraulk, subsequently identified as one of the principal participants in the violence committed that morning. The two men, riding in Wallace's pickup truck, drove part of the way down the road leading to the construction site, confirmed that the Cross workers had arrived at the scene, and returned to the highway. Shortly thereafter, the mob attacked Cross's workers. Wallace admitted that he was at the highway and that he and Faulk approached the construction site together. Not surprisingly, however, his version is less sinister. He also testified that, before leaving the area, he expressly instructed them not to engage in any violence. From this evidence, the district court concluded that the union had actually participated in the conspiracy, and we cannot say that his factual inferences and credibility resolution are clearly erroneous. Therefore, the judg-

ment against the United Brotherhood of Carpenters and Joiners, Local 610, is affirmed.

Similarly, we afirm the judgment against the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 195. Bruce Hill, one of two business representatives for the Local, appeared at the Cross construction site shortly after the violence had ended. Fulton Johnson, the Corps of Engineers inspector assigned to the Alligator Bayou project, described Hill's conduct at the scene. He testified that Hill was laughing and joking and that his light-hearted demeanor and remarks were highly inappropriate for the gravity of the situation. While Johnson and a colleague were atteempting to take photographs of the damage, Hill repeatedly interposed himself in front of the camera, urging him to take his photograph with a burning trailer behind him. Johnson recalled that Hill sarcastically told them he wanted the photograph to post on the bulletin board at the local so that "he could show his men what not to do."

Hill himself gave a more innocent account of the episode, and denied saying that he wanted the picture for the union bulletin board. His explanation for seeking the photograph was, "I don't know. I guess I am a camera freak. I like to have my picture taken." Although the local's other business representative had attended the January 15 meeting of the Trades Council when the protest was discussed, Hill said he first learned of the events around 8:00 that Friday morning when he overheard some men talking at a grocery store. He stated that he went to the Cross construction site to check on a friend who worked nearby, even though he had never been there to see him before. Although the evidence is sparse, we cannot say

that the district court's finding that the Pipefitters Local 195 was involved in the conspiracy is clearly erroneous.

Lastly, we also affirm the district court's finding as to the United Brotherhood of Carpenters and Joiners of America, Local 753. Jay Desormeaux and Curtis Beasley, members but not officers of Local 753, were both observed on the Cross construction site during the violent melee of January 17. Desormeaux recounted a conversation he had with Randy Wylie, assistant business agent for the local, on the preceding Wednesday or Thursday when they discussed the planned protest. Wylie admitted that Desormeaux had called him to ask about the demonstration but denied instructing him to go to the work site. Wylie also admitted seeing Desormeaux at the highway on the fateful Friday morning.

There was still more evidence suggesting that the union had authorized the unlawful conduct. Both Desormeaux and Beasley were named as defendants in this lawsuit. Beasley testified that, after the suit was commenced, Wylie had referred him to the union's own lawyers for representation in matters connected with his part in the violent events of January 17. Desormeaux also stated that he had spoken with both Wylie and W.H. Carr, business agent for Local 753, about obtaining a lawyer and expressed his belief that the union would pay his attorney fees. Carr informed Desormeaux that the union furnishing him with a lawyer would be "the least they could do," since he was a union member. However. Desormeaux knew of no formal arrangement by which the union regularly provided legal services to its members and conceded that the union had never done so for him. Wylie denied talking with Desormeaux about attorney's fees, but, apart from that denial, the union made no effort to rebut this testimony. It did not deny furnishing legal services for its members in

actions arising from the violence. The evidence in the record permitted the inference that the union sponsored the attack on the Cross employees and then undertook to lend assistance to its members who were discovered in the unlawful enterprise. The appellate issue is not whether we might have taken a different view had the evidence been presented initially to us. It is whether the district court's determination that the Carpenters Local 753 authorized or participated in the attack is clearly erroneous. It is not.

VI. CONCLUSION

In summary, we hold that the anti-injunction provisions of the Norris-LaGuardia Act do not deprive the district court of jurisdiction to enjoin violence, and that Congress intended 42 U.S.C. § 1985(3) to provide a remedy for private conspiracies directed at nonracial classes. Specifically, we determine that the statute encompasses a conspiracy designed to deprive nonunion workers and their employer of the First Amendment right to freely associate with one another where that conspiracy does not occur in conjunction with legitimate union activity and is perfected by force and violence. In addition, we hold that the Commerce Clause empowers Congress to reach the private conspiracy involved in the case before us. Furthermore, since this case does not involve a labor union participating or interested in a labor dispute within the meaning of 29 U.S.C. § 113(c), the clear-proof standard of 29 U.S.C. § 106 is inapplicable We conclude that the district court's findings that the Carpenters Local 610. Pipefitters Local 195, and Carpenters Local 753 authorized or participated in this conspiracy were not clearly erroneous. Nevertheless, we find that the evidence of participation in the conspiracy is insufficient to warrant the distric court's judgment against the remaining eight unions.

In light of the foregoing, the judgment of the district court is

AFFIRMED IN PART AND REVERSED IN PART.

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No. 80-2115

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

KAREN G. SILKWOOD, by the Administrator of her estate, BILL M. SILKWOOD, et al.,

Petitioners,

v.

THE KERR-McGEE CORPORATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION OF INDIVIDUAL KERR-McGEE RESPONDENTS

QUESTION PRESENTED

Whether the court below correctly applied this Court's decision in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), in holding that allegations of a conspiracy among company officers and employees against Karen Silkwood and other employees in retaliation for their activities in attempting to organize a labor union and in filing complaints against the company with the Atomic Energy Commission fail to state a claim under 42 U.S.C. §1985(3)[1] because the required racial or perhaps otherwise class-based invidiously discriminatory animus against these employees was not alleged?

[1] The most recent codification of this statute in the United States Code designates this provision as 42 U.S.C. §1985(c) (1976). However, since virtually all of the cases refer to it as §1985(3), that reference will be used in this brief.

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STATEMENT OF THE CASE

This case is an outgrowth of a labor dispute. The representatives of Karen Silkwood, who died almost two years before the action was filed and who was a company employee and a union member, have attempted to piece together an outlandish conspiracy among officers, directors, and employees of the Kerr-McGee Corporation, allegedly to deny a panoply of Silkwood's rights during the course of labor negotiations at a Kerr-McGee facility.

The complaint herein was filed in 1976 and contains three counts. It is included in the Petition here as Appendix E. The first two counts are involved here and purport to allege conspiracies to violate Silkwood's civil rights and claimed violations of the Ku Klux Klan Act, 42 U.S.C. §1985(3). The third count involved a personal injury claim. [2]

It is alleged in the two §1985(3) claims that a number of officers, directors and employees of Kerr-McGee Corporation (the "individual Kerr-McGee respondents") [3] and others conspired to deprive Silkwood and certain other persons employed at Kerr-McGee's Cimarron nuclear fuel manufacturing facility of various constitutional rights. The so-called class identified in the first claim was Silkwood and "other persons employed at Kerr-McGee Corporation's Cimarron, Oklahoma nuclear power facility who were endeavoring to organize a lawful labor union" (Complaint, ¶35, p. 15e of Appendix E). In the

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[2] This third claim was tried to a jury, resulting in a verdict for plaintiff. The judgment is currently on appeal in the Tenth Circuit, and is not involved here.

[3] The individual Kerr-McGee respondents are identified on the cover. F. C. Love and Peter Colefax have died since the filing of the complaint. Kerr-McGee Corporation is not a party to the section 1985(3) claims.

second claim the class was alleged to be Silkwood and "other persons employed at Kerr-McGee Corporation's Cimarron facility who had filed complaints against the corporation under the Atomic Energy Act" (Complaint, ¶41, p. 21e of Appendix E).

After more than a year of discovery, respondents filed a motion for summary judgment on the two §1985(3) claims, arguing that the complaint failed to state a claim upon which relief could be granted and that there was no evidence to support the allegations put forth in those two counts. The district court elected to decide only the legal issues raised by these motions and held that the complaint failed to state a claim under 42 U.S.C. §1985(3), relying primarily upon this Court's decision in *Griffin v. Breckenridge*, 403 U.S. 88 (1971). The Court of Appeals for the Tenth Circuit affirmed.

In addition to making a number of factual assertions that are neither supported by the record nor true in fact,[4] Petitioners' Statement of the Case grossly misstates the holdings of both the district court and the Tenth Circuit. Matters which Petitioners claim are dicta in the district court opinion (Pet. 6-7) are in fact a part of the holding. More importantly, contrary to the assertions of Petitioners, the Tenth Circuit did *not* expressly rule that §1985(3) protected each of the two classes described in the complaint, did *not* hold

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[4] Petitioners' carelessness with respect to factual assertions is well illustrated by their reference to an untranscribed deposition which was not part of the record below ("deposition of Edwin Youngblood," Pet. 4, 19). In addition, they rely for one of their most scurrilous assertions upon a 1981 novel ("R. P. Rashke, The Killing of Karen Silkwood," Pet. 5). While we vehemently dispute Petitioners' contentions regarding the facts, we will not discuss them herein because this matter is before this Court solely on the issue of whether the court below properly dismissed the complaint for failure to state a claim.

that the "intent of Congress" was that "these classes be protected under §1985(3)," and did *not* "set forth half a dozen separate reasons why members of these two classes of citizens were protected under §1985(3)" (Pet. 7-10).

SUMMARY OF ARGUMENT

There is no reason for this Court to grant a writ of certiorari in this case. The holdings asserted by Petitioners were never made by the court below. The Tenth Circuit's opinion is a well-reasoned application of the decisions of this Court and other federal courts, resulting in a quite narrow holding compelled by a reading of the complaint in light of this settled law.

To the allegations in Petitioners' complaint, the Tenth Circuit applied the holding in this Court's opinion in *Griffin v. Breckenridge*, that an indispensable element of any §1985(3) claim is the presence of a "racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." 403 U.S. at 102. The Tenth Circuit properly held that the feud alleged here was merely a private one and that the hatred allegedly harbored against Silkwood did not arise from any general prejudice or animus against any class of which she was a member but rather from the activities in which she and her associates were engaged during the labor dispute.

There is no conflict between the decision below and the opinion of a panel of the Fifth Circuit in *Scott v. Moore*, 640 F.2d 708 (5th Cir. 1981).[5] Rather the Tenth Circuit here and the Fifth Circuit panel in *Scott* both

[5] At the time of filing this brief the panel opinion of March 26, 1981 in *Scott v. Moore* was not final and was pending on Petition for Rehearing filed April 9, 1981.

applied the same body of law to two completely different factual situations and arrived at narrow, non-conflicting holdings with respect to each of them. Further, Fifth Circuit decisions before and after *Scott* demonstrate no conflict exists between the two Circuits.

Finally, the Tenth Circuit did not invade the province of the jury or otherwise deny Petitioners' procedural rights. As the district court had done, the Tenth Circuit merely examined Petitioners' complaint and found it lacking, holding that the private disputes alleged in the first two counts are not within the scope of coverage of §1985(3), and that to hold otherwise would make the statute applicable to all conspiratorial interferences with the rights of others.

ARGUMENT

I.

THE DECISION BELOW RAISES NO IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN SETTLED BY THIS COURT.

The Tenth Circuit held that to state a claim under §1985(3), the conspiracy must have been motivated by prejudice against a class, rather than by prejudice against particular individuals (637 F.2d at 748). In the words of the court below, the conspiracy must have been motivated by prejudice "against a class *qua* class." (Id. at 748).

As the Tenth Circuit stated, this case does not involve any general prejudice which transcends the immediate dispute. Instead, the hatred allegedly harbored against Silkwood and her associates arose solely out of their particular activities during the course of the dispute and not from their membership

in any class. Accordingly, the court held that such a dispute, being essentially private in nature, was not within the scope of §1985(3). (Id. at 748).

In so holding, the Court of Appeals merely applied the well settled principles established by this Court in *Griffin v. Breckenridge, supra.* There this Court held that §1985(3) extends to private conspiracies, but carefully limited the scope of the statute to those conspiracies motivated by racial or perhaps some other class-based, invidiously discriminatory animus, stating:

> "That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others. For, though the supporters of the legislation insisted on coverage of private conspiracies, they were equally emphatic that they did not believe, in the words of Representative Cook, 'that Congress has a right to punish an assault and battery when committed by two or more persons within a State.' . . . The constitutional shoals that would lie in the path of interpreting §1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose — by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. . . . The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." 403 U.S. at 101-102. (Emphasis in original).

In *Griffin* the Court defined the requisite motivation as an animus "to deprive the Petitioners of the equal enjoyment of legal rights *because of their race,*" 403 U.S. at 103 (Emphasis supplied). In other words, the conspiratorial discrimination must be directed at an individual *because of his membership in a class* defined by "invidious" criteria.

This is precisely the holding of the Tenth Circuit. The dismissal of Petitioners' §1985(3) claims was affirmed because it was apparent from the complaint that the alleged actions of Respondents were directed at Silkwood and her associates because of their union organizational activities and their complaints to the Atomic Energy Commission. The complaint does not allege that Silkwood and her associates were discriminated against because of some odious or irrational prejudice which the defendants harbored against a class of which Silkwood and her associates were members; instead, the complaint alleged that Silkwood and her associates were retaliated against because of their *activities.* Thus, the Tenth Circuit merely followed the settled law established in *Griffin v. Breckenridge.*

Petitioners claim the court below held that each of the two classes described by Petitioners are protected by §1985(3) but then "irrationally" concluded that the protection provided by §1985(3) goes only to redress injury from conspiracies aimed at mere passive membership in the class rather than those aimed at members actively furthering the objectives of the class. The confusion in this argument arises because Petitioners ignore the *two* functions the Tenth Circuit performed in its opinion. The first was to determine whether it had subject matter jurisdiction; the second was to determine whether a claim had been stated. The pages cited for the supposed holding that the two alleged classes are covered by §1985(3) (pp.

746-47), are plainly marked "JURISDICTION" and the Tenth Circuit was there considering whether a federal court has jurisdiction to decide this aspect of a labor dispute or whether exclusive jurisdiction lies in the National Labor Relations Board.

As this Court has held many times, the question of jurisdiction has nothing to do with whether a complaint states a claim and must be decided before the court may even address the sufficiency of the complaint. *Baker v. Carr*, 369 U.S. 186 (1962); *Bell v. Hood*, 327 U.S 678 (1946); *Binderup v. Pathe Exchange*, 263 U.S 291 (1923).

After deciding that a federal court does have independent jurisdiction to consider the *types* of claims raised by Petitioners (p. 747), the Tenth Circuit then proceeded, under the heading "Section 1985(3)," to address the question of whether Petitioners' complaint stated a cognizable claim under the statute. Even in this section of the opinion, however, the court did not hold that Petitioners' two asserted "classes" were proper for purposes of §1985(3). After noting the numerous uniform holdings by other federal courts that union-related disputes simply do not meet the requirements of §1985(3), (p. 748), the Tenth Circuit said:

> "*Even if* a union or group which has particular views on nuclear safety can be a class within the meaning of section 1985(3), no cause of action is stated here." 637 F.2d at 748 (Emphasis supplied).

The court proceeded to its holding that a complaint must show an invidiously discriminatory animus on the part of defendants and that Petitioners' claims simply do not present the motivating animus required by §1985(3).

The Tenth Circuit did not hold, as asserted by Petitioners, that Silkwood and other employees constituted a "protected class." For that reason the Petitioners' first question presented is not presented by the decision of the Tenth Circuit, but rather is fashioned out of "whole cloth" by Petitioners.

II.

THE DECISION BELOW IS NOT IN CONFLICT WITH DECISIONS OF THE OTHER COURTS OF APPEALS.

Petitioners claim there now exists a conflict between the Tenth Circuit in this case and the Fifth Circuit in *Scott v. Moore, supra.*[6] Since *Scott,* the Fifth Circuit, *en banc,* has considered *Griffin* and its application. In *Kimble v. D. J. McDuffy, Inc.,* 648 F.2d 340 (5th Cir. *en banc* 1981), the Fifth Circuit made clear that its application of *Griffin* is not in conflict with the decision of the Tenth Circuit in this case, or with the decisions of other Circuits. In *Kimble,* the court stated:

> "What *Griffin* stands for, and what we now hold, is that Section 1985 was intended to encompass only those conspiracies motivated by animus against the kinds of classes Congress was trying to protect when it enacted the Ku Klux Klan Act. Certainly 'conspiracies' against workers who file personal injury or workmen's compensation claims are not among those Congress was trying to deter in 1871." 648 F.2d at 347, n.9.

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[6] The opinion in *Scott v. Moore* was issued by a panel of the Fifth Circuit on March 26, 1981. As of the time of printing this brief (August, 1981), the case was pending on Petition for Rehearing. (Rehearing by the court *en banc* has been suggested by appellants and no order has been entered.)

This is completely in accord with the Tenth Circuit here. Further, a comparison of the opinions in *Scott* and this case shows that no conflict exists. In the first place, the Tenth Circuit made no holding in this case as to the sufficiency of anti-union animus as a basis for a §1985(3) claim, although it pointed out that other courts have uniformly found this insufficient. 637 F.2d at 748. The basis of the decision was that a private feud was involved, arising out of the activities of Silkwood and her associates.

As with the opinion in this case, Petitioners assert holdings were made in the *Scott* opinion which simply are not there. Petitioners claim that:

> "The Fifth Circuit ... expressly declared that ... anti-union organizers who were discriminatorily deprived of their constitutional rights by an invidiously discriminatory, anti-civil-rights conspiracy *because of their activities* undertaken to dissuade workers from joining a lawful labor union, *were* entitled to protection under §1985(3)." (Emphasis in original, Pet. 15).

A search of the opinion in *Scott*, reveals there is nothing in that case involving "anti-union organizers" or activities by them to dissuade workers from joining a lawful labor union.

What is involved in *Scott*, which in no way conflicts with this case, is a situation of mob violence against non-union employees (and their employer) in a "union town," where there was pervasive hatred of non-union workers, at a job-site where there was no labor organizing activity, and thus no question of any labor dispute or the applicability of national labor laws. The Fifth Circuit held that in such a factual setting, the status of "non-union worker" did establish a proper class under §1985(3), and that the non-

union animus in the absence of any labor dispute thus met the statute's requirements. It stressed that it had no intention of holding that every union or non-union controversy creates a §1985(3) claim, or that every instance of violence arising in the context of a labor dispute would do so (723). The court said that unionism or non-unionism in and of itself does not create a covered class (724). The court also emphasized the importance of the fact that there was present no campaign to organize employees (724). The narrow holding of the court was:

> "Specifically, we determine that the statute encompasses a conspiracy designed to deprive nonunion workers and their employer of the First Amendment right to freely associate with one another where that conspiracy does not occur in conjunction with legitimate union activity and is perfected by force and violence." 640 F.2d at 731.

The instant case presents the precise factual situation which the Fifth Circuit distinguished in *Scott v. Moore.* Here Silkwood and her associates were involved in a union organizational campaign, and they were allegedly the victims of several unfair labor practices committed by their employer. They were not discriminated against because of their political beliefs or associations, rather, they were allegedly retaliated against because of their activities. Accordingly, the Fifth Circuit's opinion does not conflict with the Tenth Circuit's opinion in this case.

Moreover, the decision here is in accord with decisions of other courts of appeals which have uniformly held that to state a claim under §1985(3), the discrimination against the plaintiff must have been motivated by an invidiously discriminatory animus against a class of which he is a member, rather than

by animosity toward the plaintiff or in retaliation for his activities. See, *e.g., Harrison v. Brooks,* 519 F.2d 1358, 1360 (1st Cir. 1975); *Alexander v. Unification Church of America,* 634 F.2d 673 (2d Cir. 1980); *Carchman v. Korman Corp.,* 594 F.2d 354 (3d Cir. 1979), *cert. denied,* 444 U.S. 898 (1979); *Hughes v. Ranger Fuel Corp.,* 467 F.2d 6, 10-11 (4th Cir. 1972); *Kirkpatrick v. Seligman & Latz, Inc.,* 636 F.2d 1047 (5th Cir. 1981); *Ohio Inns, Inc. v. Nye,* 542 F.2d 673, 678-79 (6th Cir. 1976); *Askew v. Bloemker,* 548 F.2d 673, 678 (7th Cir. 1976); *Arnold v. Tiffany,* 487 F.2d 216, 218-19 (9th Cir. 1973), *cert. denied,* 415 U.S. 984 (1974); *Lessman v. McCormick,* 591 F.2d 605, 608 (10th Cir. 1979); and *McCord v. Bailey,* 636 F.2d 606 (D.C. Cir. 1980). As noted in *Harrison v. Brooks, supra:*

> "The requirement that the discrimination be 'class-based' is not satisfied by an allegation that there is a conspiracy which affected the interests of a class of persons similarly situated with the plaintiffs. Rather, the Complaint must allege facts showing that the defendants conspired against the plaintiffs *because of* their membership in a class and that the criteria defining the class were invidious." 519 F.2d at 1359-60 (Emphasis supplied).

Respondents are not aware of any court of appeals case holding to the contrary.

Furthermore, the cases are uniform in holding that classes for purposes of §1985(3) cannot be defined by the activities of their members. See, *e.g., Carchman v. Korman Corp., supra,* (tenant organizers); *Arnold v. Tiffany, supra,* (organizers of a newspaper dealers association); *Hughes v. Ranger Fuel Corp., supra,* (persons reporting violations of water pollution laws); *Bricker v. Crane,* 468 F.2d 1228 (1st

Cir. 1972) (doctors who testify in malpractice suits against other doctors); *Lessman v. McCormick, supra,* (debtors); and *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. *en banc* 1977) (bankrupts).

The classes which have been upheld under §1985(3) have been defined by intrinsic characteristics or qualities such as race, ethnic origin, sex, religion or political affiliation, and the conspiracies have all been motivated by odious or irrational prejudice against the characteristic which defines the class. See, *e.g., Action v. Gannon,* 450 F.2d 1227 (8th Cir. 1971) (race); *Marlowe v. Fisher Body,* 489 F.2d 1057 (6th Cir. 1973) (ethnic origin and religion); *Life Insurance Co. of N. Amer. v. Reichardt,* 591 F.2d 499 (9th Cir. 1979) (women); and *Means v. Wilson,* 522 F.2d 833 (8th Cir. 1975) (political affiliation).

Perhaps the case most closely analogous to this case is *Taylor v. Brighton Corp.*, 616 F.2d 256 (6th Cir. 1980). There the Sixth Circuit held that a class of union members retaliated against by their employer for reporting safety violations to the Occupational Safety and Health Administration was not a cognizable class under §1985(3) because the action of the defendants was directed at the individuals in retaliation for their activities, not because of any class-based animus.

The complaint here does not allege the respondents discriminated against Silkwood and her associates because of their membership in a union, but because of their organizational activities and efforts to file complaints against their employer. The complaint does not describe an animus against all members of the union; rather it alleges an animus only against Silkwood and those who joined in her activities. Even if there were an allegation of anti-union animus, the complaint would still fail to state a claim under §1985(3). The lower federal courts that have

considered the question have all held that anti-union animus is not the kind of class-based invidiously discriminatory animus which this Court has required as the basis of a claim under §1985(3). See *Taylor v. Brighton Corp., supra; Iowa Beef Processors, Inc. v. Gorman*, 476 F.Supp. 1382 (N.D. Ia. 1979); *Ferdnance v. Automobile Transport, Inc.*, 83 CCH Labor Cases ¶10,402, 97 L.R.M. 2473, 2476 (E.D. Mich. 1978). Similarly, except in the special circumstances present in *Scott v. Moore, supra*, the courts have also held that animus against non-union workers is insufficient under §1985(3). See *Bova v. Pipefitters and Plumbers Local 60, AFL-CIO*, 554 F.2d 226, 228 (5th Cir. 1977); *Browder v. Tipton*, 630 F.2d 1149 (6th Cir. 1980); and *Western Telecasters, Inc. v. California Federation of Labor, AFL-CIO*, 415 F.Supp. 30, 33 (S.D. Cal. 1976).

III.

THE COURT OF APPEALS FOLLOWED PROPER PROCEDURE IN THIS CASE.

As a final ground for certiorari, Petitioners assert this Court should exercise its extraordinary supervisory powers over the lower federal courts because the Tenth Circuit allegedly followed improper procedures, including "invad[ing] the province of the jury," by affirming the dismissal of the complaint. (Pet. 16-20). Neither the district court nor the Tenth Circuit acted improperly in assessing the sufficiency of Petitioners' claim in response to Respondents' motions for summary judgment after permitting nearly two years of discovery. The Federal Rules of Civil Procedure provide for such procedures and this Court has sanctioned their use in determining the legal sufficiency of claims filed in federal courts. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 66 (1978), *First National Bank of Arizona v. Cities Ser-*

vice Co., 391 U.S. 253 (1968); *Warth v. Seldin*, 422 U.S 490 (1975).

Both courts below read the complaint and ruled that it failed to state a claim because it did not in any way allege the animus against a class of the type required by §1985(3). Petitioners claim that the complaint on its face charges Respondents with "*discriminatorily* depriving Karen Silkwood and her associates" of their federally-guaranteed constitutional rights. (Pet. 17). The problem with Petitioners' argument, however, is that the complaint plainly does not allege Respondents "discriminatorily" did anything. The broadest reading of Petitioners' complaint and supporting motion papers, which was given by both courts below,[7] shows that no class-based animus on the Respondents' part exists or was alleged. Petitioners presented no issue for jury resolution. They simply failed to state a claim.

What both courts below did here is not only proper but highly desirable. This case is merely one more of a mushrooming stream of cases in which claimants attempt to take an essentially private dispute involving alleged tortious conduct belonging in the state court or some other forum and convert it into a federal civil rights claim in a federal court. If the federal courts are compelled to try each of these cases before they can determine that no cause of action under §1985(3) exists, they will be hopelessly bogged down with hundreds of cases which simply do not belong in federal court. The procedure followed by the courts below in assessing allegations of Petitioners' complaint was exemplary and certainly does not constitute procedural impropriety requiring the invocation

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[7] Contrary to Petitioners' claim (Pet. 20), the record in this case was before the Court of Appeals below, just as it was before the district court.

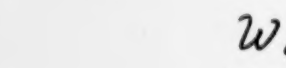
of the federal judicial supervisory powers of this Court.

CONCLUSION

Respondents respectfully submit that this case is not an appropriate one for the exercise of this Court's judicial discretion to review on writ of certiorari. There are no special or important reasons for reviewing the decision of the Tenth Circuit, which is in complete accord with applicable decisions of this Court and is not in conflict with the decisions of other circuits on the same matter. Reversal of the Tenth Circuit's decision would require a holding that classes defined by the activities of their members constitute protected classes under §1985(3). This would vitiate the limitation which this Court imposed in *Griffin v. Breckenridge* to prevent §1985(3) from becoming a general federal tort law for the redress of *all* conspiratorial interferences with the rights of others. If this complaint states a §1985(3) claim, then any discrimination or retaliation by two or more persons against any one because of his conduct would sound a §1985(3) claim. Moreover, to so hold would raise the serious constitutional problems alluded to in *Griffin*, and would seriously disrupt the operation of the carefully integrated statutory scheme of the federal labor laws. Finally, there is no need to expand §1985(3) to provide a remedy in this case, since the combination of the federal labor laws and state tort law provides completely adequate remedies for the conduct alleged in the complaint.

Since the case was correctly decided by the Tenth Circuit, the Petition should be denied.

Respectfully submitted,



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I hereby certify that on this 11th day of August, 1981, three copies of this Brief in Opposition to Petition For A Writ Of Certiorari were mailed, postage prepaid, to each of the following:

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I further certify that all parties required to be served have been served.

William G. Paul

WILLIAM G. PAUL
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Kerr-McGee Respondents

Office-Supreme Court, U.S.
FILED
SEP 21 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2115

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

KAREN G. SILKWOOD, by the Administrator of her estate, BILL M. SILKWOOD, et al.,

Petitioners,

v.

THE KERR-McGEE CORPORATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL BRIEF IN OPPOSITION OF RESPONDENTS

DEAN A. McGEE, JAMES J. KELLY, PETER COLEFAX, EARLE M. JORGENSEN, EDWIN L. KENNEDY, BREENE M. KERR, ROBERT S. KERR, JR., F. C. LOVE, GEORGE B. PARKS, A. T. F. SEALE, JAMES E. WEBB, R. T. ZITTING, PARKER S. DUNN, RONALD ADKISSON, ROY E. KING, G. J. SINKE, JAMES MARLER, G. FRANCE, III, JAMES READING, FRED WELCH, AND W. C. GENTRY

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September, 1981

THE JOURNAL RECORD PUBLISHING CO., 621 N. ROBINSON, OKLAHOMA CITY, OKLA. 235-3100

No. 80-2115

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SUPPLEMENTAL BRIEF IN OPPOSITION OF INDIVIDUAL KERR-McGEE RESPONDENTS

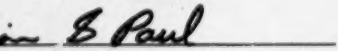
Pursuant to Supreme Court Rule 22.6, we wish to call the Court's attention to an intervening matter related to the Petition for Certiorari in this case which was not available to use at the time we filed the Brief in Opposition of the Individual Kerr-McGee Respondents.

One of the Questions Presented by the Petition in this matter is the asserted conflict between the decision of the Court of Appeals for the Tenth Circuit below and a decision by a panel of the Court of Appeals for the Fifth Circuit in *Scott v. Moore*, 640 F.2d 708 (5th Cir. 1981). We wish to advise the Court that on August 31, 1981, the Fifth Circuit granted a petition for rehearing *en banc* in *Scott v. Moore* and ordered that the case be reheard by the Court of Appeals *en banc*. A copy of that order is attached as Exhibit "A," and a copy of a letter from the Clerk of the Fifth

Circuit to counsel of record in the case is attached as Exhibit "B."

Under Rule 17 of the Rules of the United States Court of Appeals for the Fifth Circuit, unless otherwise expressly provided, the effect of granting a rehearing *en banc* is to vacate the panel opinion. Therefore, the opinion reported at 640 F.2d 708 and relied upon by Petitioners has been vacated by the Fifth Circuit.

Respectfully submitted,



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INFO COPY

INFO COPY

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
AUG 31 1981
GILBERT F. GANUCHEAU
CLERK

No. 79-1196

PAUL E. SCOTT, ET AL.,

Plaintiffs-Appellees,

versus

BILL MOORE, ET AL.,

Defendants,

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL #870, ET AL.,

Defendants-Appellants,

INTERNATIONAL UNION OF OPERATING ENGINEERS, ETC., AFL-CIO, LOCAL 450,

Defendant-Appellant.

- - - - -

Appeals from the United States District Court for the Eastern District of Texas

- - - - -

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion March 26, 1981, 5 Cir., 1981_____, _____F.2d_____).

(August 31, 1981)

Before GODBOLD, Chief Judge, BROWN, AINSWORTH, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, JR., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON, THOMAS A. CLARK, and WILLIAMS, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

Exhibit A

United States Court of Appeals

FIFTH CIRCUIT

GILBERT F. GANUCHEAU
CLERK

OFFICE OF THE CLERK

TEL 504-589 6514
600 CAMP STREET
NEW ORLEANS, LA 70130

August 31, 1981

TO ALL COUNSEL OF RECORD:

No. 79-1196 - Scott v. Moore

Dear Counsel:

Enclosed is an order this day entered by the Court directing that this case be reheard en banc with oral argument.

Under Fifth Circuit Local Rule 17 the effect of granting a rehearing en banc is to vacate the previous opinion and judgment of this Court and to stay the mandate.

Pursuant to this Court's direction for the Clerk to specify a briefing schedule for the filing of supplemental briefs, appellants will have until September 30, 1981, for filing their supplemental brief, with appellees' supplemental brief to be filed in this office not later than October 30, 1981. The supplemental briefs must be on file in the Clerk's office by the specified dates above.

All parties are requested to furnish thirty (30) copies of their supplemental briefs and opening briefs previously filed, for the use of the en banc court.

Very truly yours,

Gilbert F. Ganucheau
Clerk

GFG/jmg
Enclosure

Mr. Martin W. Dies
Mr. William N. Wheat
Mr. Paul F. Waldner
Messrs. Arthur R. Almquist &
Robert Q. Keith

cc: Hon. Joe J. Fisher

Exhibit B

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September, 1981, three copies of this Supplemental Brief in Opposition to Petition For A Writ Of Certiorari were mailed, postage prepaid, to each of the following:

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Kerr-McGee Respondents

Office-Supreme Court, U.S.
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No. 80-2115

In the Supreme Court of the United States

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v.

THE KERR-MCGEE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the dismissal of petitioners' claims under 42 U.S.C. 1985(3) on the ground that the alleged conspiracy was essentially a tortious action arising out of a private feud and not one motivated by racial, or any other invidiously discriminatory, class-based animus.

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In the Supreme Court of the United States

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 637 F. 2d 743. The opinion of the district court (Pet. App. 1d-29d) is reported at 460 F. Supp. 399.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 1980, and a petition for rehearing initially was denied on January 16, 1981 (Pet. App. 1b-2b). On petitioners' motion, the court of appeals recalled its mandate, withdrew its order denying rehearing, and reentered its mandate and order denying rehearing on April 6, 1981 (Pet. App. 1c-2c). On April 15, 1981, Justice White extended the time within which to file a petition for a writ of certiorari to June 15, 1981, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

42 U.S.C. 1985(3) provides in relevant part:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; * * * in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT

1. In November 1976, petitioners, the administrator of the estate and the heirs and survivors of Karen G. Silkwood, filed this action against the Kerr-McGee Corporation, several of its officers, directors and employees, a journalist, and two named and one unnamed agents of the Federal Bureau of Investigation (Pet. App. 1e-32e). As a first cause of action, petitioners charged the private defendants with engaging in a conspiracy—allegedly manifested by, *inter alia*, physical and electronic surveillance, trespass and harassment—to deprive Silkwood "and other persons employed at Kerr-McGee Corporation's Cimarron, Oklahoma nuclear power facility who were endeavoring to organize a lawful labor union to improve their working standards" of the equal protection and enjoyment of the rights "to freedom of speech, freedom of association, freedom of the press, freedom of movement and travel, freedom of assembly, their right to petition their government for the

r 'ress of their grievances, their right to be secure in their persons, homes and effects and their right not to be deprived of their lives or liberty other than by the due process of law" (*id.* at 15e-16e).

Petitioners' second cause of action was virtually identical to the first, except that it defined the target of the alleged conspiracy as Silkwood "and other persons employed at Kerr-McGee Corporation's Cimarron facility who had filed complaints against the Corporation under the Atomic Energy Act" (Pet. App. 21e). Both causes of action were predicated on 42 U.S.C. 1985(3).

Petitioners alleged that the FBI agents joined in an attempt to cover up the private parties' prior conspiratorial actions in November 1974, following Silkwood's death (Pet. App. 4a, 27d, 16e, 20e, 22e, 26e). On that ground, the FBI agents were named in the Section 1985(3) counts. Both courts below also construed these same allegations as seeking damages against the agents under a *Bivens* "constitutional tort" theory (*Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)).[1]

2. The district court dismissed petitioners' Section 1985(3) claims for failure to state a claim upon which relief could be granted and awarded the federal defendants summary judgment on the *Bivens* claim (Pet. App. 1d-29d).

---

[1]In a third cause of action, premised on state law, petitioners sought damages from the Kerr-McGee Corporation for injuries and property loss incurred by Silkwood as a result of her exposure to radiation (Pet. App. 3e, 27e-28e). After the claims that are the subject of this petition were dismissed for failure to state a claim upon which relief could be granted, the state law claim proceeded to jury trial and resulted in an award of $505,000 in compensatory damages and $10,000,000 in punitive damages. *Silkwood* v. *Kerr-McGee Corp.*, 485 F. Supp. 566, 570 (W.D. Okla. 1979), appeal docketed, No. 79-1894 (10th Cir. Aug. 20, 1979).

The court began its analysis of petitioners' Section 1985(3) claims (Pet. App. 6d-7d) with this Court's admonition in *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), that Congress intended to confine the scope of that section to the prevention of constitutional violations motivated by class-based discriminatory animus (*id.* at 102; footnote omitted; emphasis in original):

> The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. * * * The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.

While it recognized (Pet. App. 11d) that several courts of appeals have applied Section 1985(3) to groups defined by characteristics other than race—such as gender (*Novotny* v. *Great American Federal Savings & Loan Ass'n*, 584 F. 2d 1235, 1243-1244 (3d Cir. 1978) (en banc), rev'd on other grounds, 442 U.S. 366 (1979)) and religion (*Marlowe* v. *Fisher Body*, 489 F. 2d 1057 (6th Cir. 1973))—the district court observed (Pet. App. 15d) that in the present case "both classes alleged are narrowly defined and tied to the particular circumstances of the claimed conspiracy." Because the classes against which the conspiracy was alleged to have been directed "did not * * * exist prior to the occurrence of the events set forth in the complaint and * * * [were] defined by one particular activity or by [Silkwood's] individual situation," the district court concluded that no class-based animus, as the term was used in *Griffin*, could be said to have motivated the alleged conspiracy (*id.* at 16d).

The district court granted the FBI agents' motion for summary judgment on petitioners' *Bivens* claim on the ground that the agents, who did not become involved in the case until after Silkwood's death, "could not have violated the constitutional rights of Karen Silkwood during her lifetime" (Pet. App. 27d).

3. The district court authorized an appeal under Fed. R. Civ. P. 54(b), and the court of appeals affirmed (Pet. App. 1a-12a). Concurring in the district court's interpretation of Section 1985(3), the court of appeals noted (Pet. App. 9a) that "[r]ead literally the statute has nearly unlimited application to private conspiracies designed to deprive persons of the equal protection of the law." Recognizing, however, that this "Court limited the Act's application by requiring as an element of the cause of action 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action' " (*ibid.*, quoting *Griffin* v. *Breckenridge, supra*, 403 U.S. at 102), the court of appeals expressed doubt whether conspiracies against unions or groups with particular views on nuclear safety could satisfy that requirement (Pet. App. 9a-10a). Like the district court, however, the court of appeals found it unnecessary to reach the question whether the deprivation of a person's rights because of his or her membership in either of those groups would satisfy the class-based discriminatory animus requirement, because it found that petitioners' complaint, read as a whole, did not allege a conspiracy motivated by general animus against such groups. As the court of appeals explained (*id.* at 11a):

> To state a cause of action under section 1985(3) the law requires prejudice against a class *qua* class. Here it seems clear from the complaint as a whole that the feud, if there is one, is private; no general prejudice which transcends the immediate dispute is shown.

The court of appeals agreed with the district court that including within the reach of Section 1985(3) "classes" defined essentially by individuals' conduct or activities in a particular circumstance "would make § 1985(3) 'applicable to all conspiratorial interferences with the rights of others, as there are no bounds upon the ingenuity of counsel in pleading novel and diverse classes to fit every conceivable situation' " (Pet. App. 11a, quoting *id.* at 16d).

The court of appeals also affirmed the summary judgment in favor of the FBI agents on petitioners' *Bivens* claim. Reiterating that the federal defendants were not alleged to have been involved in the matter until after Silkwood's death, the court "agree[d] * * * that the civil rights of a person cannot be violated once that person has died" (Pet. App. 11a-12a) and further held (*id.* at 12a; emphasis in original) that "the FBI defendants could not be held liable for the *prior* violations of Silkwood's constitutional rights even if a *Bivens* claim encompasses a relation back theory of conspiracy law."[2]

ARGUMENT

1. Further review of the decision below is unwarranted because it turns on the narrow—and plainly correct—conclusion that an action based on 42 U.S.C. 1985(3) must allege a conspiracy motivated by animus against a person because he or she is a member of a class identifiable apart from the incidents on which the lawsuit is based, and not because he or she has joined with others in the particular activities that give rise to a lawsuit.

When this Court construed Section 1985(3) to reach purely private conspiracies in *Griffin* v. *Breckenridge*, *supra*, it cautioned (403 U.S. at 102) that actions under that

---

[2]Petitioners have not challenged the court of appeals' holding on the *Bivens* claim in this Court.

statute must allege at least a class-based, "invidiously discriminatory motivation" behind the conspirators' actions in order to avoid "[t]he constitutional shoals that [otherwise] would lie in the path" of applying the statute to private conspiracies. The Court remarked that, if this limitation were not imposed, Section 1985(3) would be transformed against Congress' intent (and possibly beyond its constitutional authority) into an open-ended right of action, applicable "to all tortious, conspiratorial interferences with the rights of others" (403 U.S. at 101).

It was precisely on this directive that the rulings below were based. Petitioners conceded that their class allegations were "narrowly defined and tied to the particular circumstances of the claimed conspiracy" (Pet. App. 15d). Respondents were not alleged to have conspired against Silkwood because of her membership in the general class of "union organizers" or complainants to the Atomic Energy Commission, but rather because of her particular actions in a private feud with the Kerr-McGee Corporation. The alleged "classes" were thus mere constructs of persons asserted to have responded as Silkwood did to the allegedly unsafe working conditions at the Kerr-McGee facility. As both courts below recognized (Pet. App. 11a, 16d), were petitioners' theory adopted, "classes" encompassed by Section 1985 could be fashioned "to fit every conceivable situation," limited only by "the ingenuity of counsel."

In so holding, the Tenth Circuit joined an unbroken line of appellate decisions rejecting classes defined in terms of the common actions of their members as insufficient for purposes of Section 1985(3). For example, in *Arnold* v. *Tiffany*, 487 F. 2d 216 (9th Cir. 1973), cert. denied, 415 U.S. 984 (1974), a group of independent news dealers and distributors brought suit under Section 1985(3), alleging a conspiracy by representatives of the *Los Angeles Times* and another independent news dealer to prevent them from

forming a trade association in violation of the rights and privileges guaranteed them by the First and Fourteenth Amendments. The Ninth Circuit remarked (487 F. 2d at 218 (footnote omitted)):

> The flaw appears in the [plaintiffs'] syllogism when the "animus" alleged herein is compared to that in *Griffin*. * * * [H]ere, the appellants were not injured because they were newspaper dealers, the class alleged, but because of their activities in attempting to maintain a dealer association. The animus is directed at and derived from the dealer association and is divorced from the fact that there is a class of newspaper dealers.

Similarly, in *Taylor* v. *Brighton Corp.*, 616 F. 2d 256 (1980), the Sixth Circuit rejected a Section 1985(3) claim by employees of the defendant corporation alleging a conspiracy to discharge them for reporting safety violations to the Occupational Safety and Health Administration and for belonging to a union. After carefully parsing the complaint, the court characterized the plaintiffs' alleged "class" as having been "defined solely by the conduct of its members" (616 F. 2d at 265). In such circumstances, the court held (*id.* at 266; emphasis in original),

> [the] complaint, however, does not allege that the [defendants] conspired to deny [the plaintiffs] *equality* under the law. Rather, the essence of their claim is that the alleged conspiracy was designed to deny *all* Brighton employees their constitutional and statutory rights to complain about the corporation's safety violations, racial discrimination, and labor practices without becoming victims of retaliation. While the discriminatory retaliation that furthered the alleged conspiracy was directed only at those employees who in fact exercised their rights, the purpose of the alleged conspiracy was to deny the rights of all. Thus, there was no conspiracy to deny *equal* protection or *equal* privileges and

> immunities. Appellants' purported class is nothing more than the group of Brighton employees whose complaints singled them out for discriminatory treatment. It is a group defined by conduct, but it is not a class cognizable under § 1985(3).

Accord, *Hughes* v. *Ranger Fuel Corp.*, 467 F. 2d 6 (4th Cir. 1972) (assuming *arguendo* that Section 1985(3) is not restricted to conspiracies motivated by racial bias, persons allegedly assaulted for attempting to document and report violations of the 1899 Refuse Act are not a class cognizable under the statute because "[t]he action of the defendants was directed at the plaintiffs as individuals because * * * [of] their activities on that particular occasion, not because of any animus against them as members of some class or race" (467 F. 2d at 10; footnote omitted)); cf. *Kimble* v. *D.J. McDuffy, Inc.*, 648 F. 2d 340, 347 (5th Cir. 1981) (en banc) (rejecting, as lacking the racial or other class-based animus required by 42 U.S.C. 1985(2), class of workmen's compensation claimants formed "merely by virtue of their common complaint").

Petitioners ignore these precedents and argue instead (Pet. 10-14) that this Court recognized the viability under Section 1985(3) of classes defined by their members' actions in *Griffin* v. *Breckenridge, supra.* In *Griffin*, petitioners contend, the plaintiffs were found to be the victims of an actionable conspiracy because they were thought to be civil rights "workers" and "activists." But petitioners misconstrue *Griffin*, in which the Court expressly held (403 U.S. at 103) that the conspiracy was motivated by racial discrimination and that defendants' "animus [was] to deprive the [plaintiffs] of the equal enjoyment of legal rights because of their race."[3]

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[3]Petitioners also contend (Pet. 16-20) that the Court should grant the petition in order to exercise its supervisory powers over the Tenth Circuit and discipline that court for resolving "a pivotal material fact

2. Contrary to petitioners' contention (Pet. 14-16), there is no "direct conflict" between the decision below and *Scott* v. *Moore*, 640 F. 2d 708 (5th Cir. 1981), petition for rehearing filed Apr. 9, 1981). In *Scott*, a panel of the Fifth Circuit held that nonunion workers, alleged to have been brutally beaten as a result of a conspiracy among members of local unions in a "union town," constituted a class cognizable under Section 1985(3). The *Scott* court, however, expressly limited its decision to the facts of that particular case, emphasizing (640 F. 2d at 723-724) that "[o]ur decision does not imply that every union-nonunion controversy can create a section 1985(3) cause of action. * * * Unionism or nonunionism in and of itself does not create a covered class." Indeed, the court stated that "[n]ot every conceivable class of persons is covered by the statute. Members of the plaintiff class must share some common characteristic beyond simply being victims of the defendant's conspiratorial conduct" (*id.* at 720).

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question" (*id.* at 16). Specifically, petitioners accuse the court of appeals of improperly "finding" that the alleged conspiracy was directed *only* against Silkwood and not against other members of the "classes" alleged. But petitioners themselves conceded that the "classes" they alleged were "tied to the particular circumstances of the claimed conspiracy" (Pet. App. 15d), and the court of appeals referred expressly (*id.* at 11a; emphasis added) to "the hatred which defendants allegedly harbor * * * against Karen Silkwood *and her associates* arising out of the activities of parties involved." The court of appeals thus assumed *arguendo* that the alleged discrimination was class-based, but held that it was not based on a class cognizable under Section 1985(3) because, under petitioners' own definition of the alleged "classes," they were identifiable only by reference to their members' activities.

Moreover, the Fifth Circuit characterized the theory of the plaintiffs' case in *Scott* (640 F. 2d at 719; emphasis added) as their having been the victims of a conspiracy motivated by "hostility toward *nonunion workers of any race* and the employers who hire them," and the court agreed (640 F. 2d at 723) that the plaintiffs "were denied the equal protection of law because they did not belong to a labor organization or worked for an employer which did not have a collective bargaining agreement and which hired workers without regard to their union membership." Thus, in contrast to the present case, the defendants in *Scott* were charged with conspiring against persons because they were members of a class identifiable apart from the circumstances of the particular case, not because of actions taken by them in a specific situation.[4]

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[4]The *Scott* court compared the plaintiffs in that case to "persons who are victimized because of their political beliefs and associations" (640 F. 2d at 721, 723). Similarly, the court below suggested that the class requirement of Section 1985(3) might be satisfied by allegations that a conspiracy was motivated against an individual "because he was a Democrat" (Pet. App. 10d, quoting Cong. Globe, 42d Cong., 1st Sess. 567 (1871) (remarks of Sen. Edmunds)).

Although, for the reasons discussed in the text, *Scott* does not conflict with the decision below, it may conflict with a prior decision of the Fifth Circuit, *Bova* v. *Pipefitters Local 60*, 554 F. 2d 226 (1977) (conspiracy claims by a nonunion employee against his employer and the local union failed to meet the "class-based animus" requirement of *Griffin* v. *Breckenridge*, *supra*), and may depart in principle from two en banc decisions of that court. See *Kimble* v. *D.J. McDuffy, Inc.*, *supra* (construing the "animus" requirement of *Griffin* as precluding claims under Section 1985(2) by a "class" of workers who filed personal injury or workmen's compensation claims); *McLellan* v. *Mississippi Power & Light Co.*, 545 F. 2d 919 (5th Cir. 1977) (individuals who filed petitions for bankruptcy under federal law do not constitute a class protected by Section 1985(3)). In particular, in *Kimble*, which was decided after *Scott*, the en banc court enunciated principles for construing Section 1985(2) that seem inconsistent with those applied in *Scott*. See 648 F. 2d at 345-347. As noted above, a petition for rehearing in *Scott* is currently pending.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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